

THE DOG THAT DIDN'T BARK: STEALTH PROCEDURES AND THE EROSION OF STARE DECISIS IN THE FEDERAL COURTS OF APPEALS

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Informal en banc review is a procedural expedient that nine of the thirteen federal circuits use to circumvent the requirements of formal en banc review. Panels invoke informal en banc review to overrule prior panel precedent in contravention of the law of the circuit rule, as well as to take other actions normally reserved for the full court sitting en banc. The circuits that use informal en banc review say the procedure is to be used rarely. In practice, however, the frequency of informal en banc review is significant when compared with formal en banc review.

Informal en banc review is a stealth procedure that is virtually beyond review because the federal appellate courts both authorize and implement it on their own. The procedure is difficult to track because the action triggering informal en banc review is often buried in footnotes. Informal en banc review is more efficient than formal en banc review, but the efficiency benefits come at a price. Informal en banc review is used arbitrarily. Courts should not hide changes to the law in footnotes because their actions should be transparent, and using footnotes to change the law makes legal research difficult. The procedure appears to be used disproportionately in criminal cases, and in all cases in which it is used, it deprives the parties of the opportunity to participate in the decisional process. The procedure can also damage judicial collegiality by depriving minority-view judges of opportunities to present their views. Informal en banc opinions inject uncertainty into the system of precedent because their precedential status is unclear. Further, informal en banc review can result in poor decision making when changes to the law are based on incomplete information.

This Article explores informal en banc review in depth. It traces the history and use of informal en banc review by detailing the circumstances under which the procedure is used. It then analyzes the advantages and

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disadvantages of informal en banc review and proposes procedures to ensure that informal en banc review is used only on legitimate terms.

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INTRODUCTION

Over the last generation, the federal courts of appeals have implemented a number of procedures that shortcut traditional appellate decisionmaking processes in an effort to manage burgeoning case loads. For example, they decide cases without oral argument, use staff attorneys and clerks to draft opinions, and issue the vast majority of their written dispositions as nonprecedential opinions.¹ All of these procedures have been critiqued in

1. See generally William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

legal scholarship.² One similar expedient that has not received careful scrutiny is “mini” or “informal” en banc review, a procedure nine of the thirteen federal appellate circuits use to circumvent the requirements of formal en banc review.³ Panels invoke informal en banc review to overrule prior panel precedent in contravention of the law of the circuit rule, as well as to take other actions normally reserved for the full court sitting en banc.⁴ This might not matter if informal en banc cases were “hen’s-teeth rare.”⁵ Two circuits, however, use it more frequently than formal en banc review, and three others use it often enough in comparison to the number of formal en banc cases to be noteworthy.⁶

One reason informal en banc review has not been studied in depth is its stealth. Informal en banc cases are hard to find because panels routinely bury the action triggering informal en banc review in footnotes.⁷ Until very recently, the U.S. Court of Appeals for the District of Columbia Circuit’s policy statement implementing the practice was unavailable to the public.⁸ The practice is virtually beyond review because the federal appellate courts both authorize and implement it on their own. The federal appellate courts themselves rarely discuss informal en banc review in their opinions, and the U.S. Supreme Court has never weighed in on the practice. Because it is an internal court process that panels invoke sua sponte, parties cannot predict when they may become subject to it or participate in persuading the other members of the court to their positions.⁹

This Article explores informal en banc review in depth. Part II details the history and use of informal en banc review. It discusses the relationship between stare decisis and the law of the circuit rule, which provides that the court must convene en banc to overrule a prior panel opinion, and explains

2. See, e.g., Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685 (2001); Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007); Richman & Reynolds, *supra* note 1. The earliest critique of nonprecedential opinions appeared over thirty years ago. William M. Richman & William L. Reynolds, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978).

3. Although informal en banc review is mentioned in legal scholarship from time to time, see, e.g., Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1042–43 (1991), it has been the subject of only one article, Steven Bennett & Christine Pembroke, “Mini” In Banc Proceedings: A Survey of Circuit Practices, 34 CLEV. ST. L. REV. 531 (1986). See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1045 n.136 (2003) (noting the lack of studies tracking use of informal en banc review and opining that it is used infrequently). This form of review is sometimes called “mini” en banc review. See, e.g., *United States v. Parkes*, 497 F.3d 220, 230 n.7 (2d Cir. 2007); *Michel v. INS*, 206 F.3d 253, 268 n.2 (2d Cir. 2000) (Cabrane, J., concurring). This Article, however, uses the term informal en banc.

4. See *infra* Part III.B.

5. *United States v. Guzmán*, 419 F.3d 27, 31 (1st Cir. 2005).

6. See *infra* p. 728, fig.1 and Part III.B.1.

7. See *infra* Part III.B.

8. See *infra* notes 138–40.

9. See *infra* Part III.B.5.

the differences between formal and informal en banc review. It also traces the history of the development of informal en banc review in the circuits that use it and provides data on the frequency and circumstances under which it is used.¹⁰

In Part III, this Article explores the advantages and disadvantages of informal en banc review. Informal en banc review is not wholly illegitimate. Courts have the judicial power to use it, and the practice has some advantages. To the extent that informal en banc review brings full court consideration to a greater number of issues than would be possible through formal en banc review, it may benefit litigants and the judicial system. This is especially true when panels use it to obtain the full court's agreement on issues that do not necessarily require formal en banc consideration, such as questions of first impression. The "behind the scenes" nature of the procedure can also benefit the collegiality of the court because it keeps judges from questioning the work of colleagues in public, as often occurs with formal en banc review.¹¹

Just because the federal appellate courts can use informal en banc review, however, does not mean that they should. The advantages this shortcut practice provides come at a price. Informal en banc review is used arbitrarily because most circuits lack standards governing when the procedure is appropriately used, consequently undermining principles of stare decisis. Hiding changes to the law in footnotes is contrary to the transparency required of the judicial process and makes legal research unnecessarily difficult. A review of cases indicates that informal en banc review may disproportionately affect criminal defendants, a group traditionally marginalized by the court system. And although informal en banc review can in some ways improve collegiality, it can also undermine relations among judges by allowing a panel to change the law without giving judges who oppose the panel's action sufficient opportunity to present their views. The "behind the scenes" nature of the procedure also deprives litigants of meaningful opportunity to participate in the decisional process. The uncertain precedential status of informal en banc opinions and the risk that judges will agree to changes in the law without sufficient information or consideration are further disadvantages of the procedure.¹²

Given these advantages and disadvantages, this Article proposes formalizing the standards and processes for use of informal en banc review to ensure that the federal courts invoke the practice only under legitimate conditions. It argues that the federal appellate courts should not use informal en banc review to overrule prior panel precedent. Using informal en banc review this way risks arbitrary decision making and threatens judicial legitimacy, and these disadvantages outweigh any efficiency advantages. If the federal appellate courts choose to use informal en banc

10. See *infra* Part II.

11. See *infra* Part III.A.

12. See *infra* Part III.B.

review in other circumstances, they need to articulate clear procedures governing the practice. Informal en banc dispositions should be unanimously approved and should not be relegated to footnotes. In authorizing informal en banc review, the federal appellate courts should act through adjudication, not through local rules or internal operating procedures, because adjudication is the appropriate vehicle for making rules of precedent.¹³

This Article concludes that the federal appellate courts should not be unduly restrained in their ability to craft procedures short of formal en banc review to develop circuit precedent. But the courts must carefully monitor the ways these policies are used to avoid undermining the legitimacy of the judiciary.¹⁴

I. OVERVIEW OF FORMAL AND INFORMAL EN BANC PROCEDURES

A. *Formal En Banc Review*

To understand informal en banc review, it is important to understand formal en banc review and its relationship to stare decisis. Stare decisis operates in two directions: vertically and horizontally.¹⁵ Vertical stare decisis refers to the requirement that lower tribunals within a court structure follow the decisions of higher tribunals.¹⁶ Horizontal stare decisis refers to the rule that courts adhere to their own prior decisions.¹⁷ In the federal court system, horizontal stare decisis obtains only at the appellate level; because federal district court decisions are not binding on later tribunals,¹⁸ those courts are never constrained to follow their own prior opinions. At the appellate level, the courts of appeals and the Supreme Court do not have to follow their own opinions, but they also do not routinely disregard them.¹⁹ The federal appellate courts must balance the need to follow their

13. *See infra* Part IV.

14. *See infra* Conclusion.

15. Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 827 (2008); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 712 n.6 (2004).

16. RICHARD B. CAPPALLI, *THE AMERICAN COMMON LAW METHOD* § 7.01, at 79 (1997).

17. *Id.* (“[P]recedent applies, overall, with equal force in the same court as in its inferiors (excluding the power to overrule).”).

18. *Hart v. Massanari*, 266 F.3d 1155, 1163 (9th Cir. 2001) (noting that federal trial court opinions are not binding precedent); *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991) (explaining that “there is no such thing as ‘the law of the district,’” such that federal district court opinions are not binding in later cases); Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1179 (2006) (noting that federal district court opinions do not bind later courts).

19. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“We approach the reconsideration of decisions of this Court with the utmost caution. . . . [b]ut ‘[s]tare decisis is not an inexorable command.’” (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991))); *see also* MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 9–14 (2008) (discussing patterns in the U.S. Supreme Court’s overruling of its own precedent).

own prior opinions against the need for the law to evolve.²⁰ The preferred course of action is for courts to follow their own prior opinions for the sake of consistency and social stability. People need to know the rules that govern their conduct to organize their lives, and basic fairness requires that similarly situated parties be treated similarly.²¹ Further, the amount of work the courts would have to do if they had to revisit each question anew in each case would be overwhelming.²² On the other hand, this policy cannot be inflexible. Circumstances change, and sometimes opinions are poorly reasoned or outright wrong.²³ Therefore, the requirement that courts at the same level follow their own prior opinions is not as strong as the requirement of vertical stare decisis.²⁴ Indeed, horizontal stare decisis has been characterized as a policy subject to exception rather than as a rule requiring adherence at all times.²⁵ As one court explained, horizontal “*stare decisis* is neither a straightjacket nor an immutable rule.”²⁶

In the federal appellate courts, the law of the circuit rule implements the policy of horizontal stare decisis.²⁷ The law of the circuit rule provides that the decision of one panel is the decision of the court and binds all future panels unless and until the panel’s opinion is reversed or overruled, either

20. See, e.g., *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (explaining that vertical stare decisis is the simplest form to apply because it is based on the hierarchical relationship between courts, but that the relationship between a court and its own prior opinions is the most complex).

21. *Payne*, 501 U.S. at 827 (noting that adherence to prior precedent “is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process”); see also CAPPALLI, *supra* note 16, §§ 7.05–.07, at 80–83 (explaining the purposes of stare decisis).

22. CAPPALLI, *supra* note 16, §§ 7.15–.16, at 87–88 (“Without a system of binding precedent lawyers would be encouraged to raise the same questions again and again, adding to the court’s already intolerable caseloads.”).

23. See *id.* § 7.20, at 90 (“Horizontal precedent applies vigorously and the image of law demands as much. But the need to adjust doctrine to current realities and needs beckons also.”).

24. See, e.g., *Colby*, 811 F.2d at 1123 (explaining that opinions of superior courts bind subsidiary tribunals and that, while a court must give considerable weight to its own prior opinions, it “is not absolutely bound by them, and must give fair consideration to any substantial argument that a litigant makes for overruling a previous decision”).

25. See, e.g., *Eulitt ex rel. Eulitt v. Me., Dep’t of Educ.*, 386 F.3d 344, 349 (1st Cir. 2004) (explaining that, although a justice system based on precedent favors the values of finality, stability, and certainty, stare decisis is not an immutable rule, and panels of a court of appeals have some modest amount of flexibility to reevaluate the circuit’s own precedents); see also CAPPALLI, *supra* note 16, § 7.14, at 86 (explaining that stare decisis is a doctrine of “flexible stability,” with the “flex” coming from the power to overrule, and the “stability” from the courts’ strong reluctance to do so).

26. *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 142 (1st Cir. 2000).

27. See, e.g., *United States v. Guzmán*, 419 F.3d 27, 31 (1st Cir. 2005) (explaining that later panels are ordinarily bound by prior panel decisions and characterizing this requirement as the “law-of-the-circuit doctrine”); *Eulitt*, 386 F.3d at 349 (explaining that the rule that later panels are bound by earlier panel decisions is “a specialized application of the stare decisis principle”).

by the circuit sitting en banc or the Supreme Court.²⁸ Every circuit follows the law of the circuit rule.²⁹ Statements of the rule in judicial opinions are echoed in several courts' local rules and internal operating procedures.³⁰

Although the law of the circuit rule is the general rule, it is somewhat elastic in application.³¹ Sometimes courts state the rule especially strongly.³² Other times, the expression of the rule is more relaxed.³³ Even

28. See, e.g., *Pointer v. Wilkinson*, 502 F.3d 369 (6th Cir. 2007); *Teva Pharms. USA, Inc. v. Novartis Pharms. Corp.*, 482 F.3d 1330 (Fed. Cir. 2007); *Swann v. S. Health Partners, Inc.*, 388 F.3d 834 (11th Cir. 2004); *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004); *United States v. Pena-Sarabia*, 297 F.3d 983, 989 n.2 (10th Cir. 2002); *United States v. Chong*, 285 F.3d 343 (4th Cir. 2002); *United States v. Buckland*, 259 F.3d 1157 (9th Cir. 2001); *Payton v. Woodford*, 258 F.3d 905 (9th Cir. 2001); *United States v. Pollard*, 249 F.3d 738 (8th Cir. 2001); *BankBoston, N.A. v. Sokolowski (In re Sokolowski)*, 205 F.3d 532, 535 (2d Cir. 2000); *United States v. Cont'l Airlines (In re Cont'l Airlines)*, 134 F.3d 536 (3rd Cir. 1998); *Billiot v. Puckett*, 135 F.3d 311 (5th Cir. 1998); *United States v. Allah*, 130 F.3d 33, 38 (2d Cir. 1997); *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993); *Colby*, 811 F.2d at 1123; *United States v. Bryant*, 471 F.2d 1040, 1046 (D.C. Cir. 1972).

29. See, e.g., *Gonzalez-Mesias v. Mukasey*, 529 F.3d 62, 65 (1st Cir. 2008); *Gandara v. Bennett*, 528 F.3d 823, 829 (11th Cir. 2008); *Brubaker Amusement Co. v. United States*, 304 F.3d 1349, 1360 (Fed. Cir. 2002); *Brooks v. Walls*, 279 F.3d 518, 522–23 (7th Cir. 2002); *E. Pilots Merger Comm. v. Cont'l Airlines, Inc. (In re Cont'l Airlines, Inc.)*, 279 F.3d 226, 233 & n.4 (3d Cir. 2002); *Walker v. S. Co. Servs.*, 279 F.3d 1289, 1293 (11th Cir. 2002); *United States v. King*, 276 F.3d 109, 112 (2d Cir. 2002); *Valentine v. Francis*, 270 F.3d 1032, 1035 (6th Cir. 2001); *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 198 (D.C. Cir. 2001); *Mentavlos v. Anderson*, 249 F.3d 301, 312 n.4 (4th Cir. 2001); *United States v. Pollard*, 249 F.3d 738, 739 (8th Cir. 2001); *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001); *Summum v. Callaghan*, 130 F.3d 906, 912 n.8 (10th Cir. 1997); *In re Grand Jury Subpoenas*, 123 F.3d 695, 697 n.2 (1st Cir. 1997). See generally Alan R. Gilbert, Annotation, *In Banc Proceedings in Federal Courts of Appeals*, 37 A.L.R. FED. 274, § 5 (1978 & Supp. 2008–09) (collecting cases).

30. FED. CIR. R. 35(a)(1) (“[O]nly the court en banc may overrule a binding precedent”); 3D CIR. INTERNAL OPERATING PROCEDURE 9.1 (“It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so.”); 6TH CIR. R. 206(c) (“Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.”).

31. See Patricia M. Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 480 (1986) (explaining that the application of the law of the circuit rule is not as tidy as a simple statement of the rule would suggest).

32. *Guzmán*, 419 F.3d at 31 (characterizing itself as “firmly bound” by the court’s prior panel opinions and noting that the law of the circuit rule applies to prior panel opinions even when those opinions are closely, but not directly, on point); *Wilkerson*, 361 F.3d at 732 (stating that if the panel were the first to address the issue presented in the case, it might have reached a different conclusion, but deeming itself bound by prior panel opinions pending overruling by the court en banc or the Supreme Court); *Wilson v. Taylor*, 658 F.2d 1021, 1034 (5th Cir. Unit B Oct. 1981) (“It is the firm rule of this circuit that we cannot disregard the precedent set by a prior panel, even though we perceive error in the precedent. Absent an intervening Supreme Court decision which changes the law, only the *en banc* court can make the change.”); *In re Cent. R.R. Co. of N.J.*, 485 F.2d 208, 211 (3d Cir. 1973) (“Indeed, it is *only* through the Court En Banc that precedents established by earlier panel decision may be reexamined.”). Indeed, when faced with conflicting circuit precedents, the U.S. Court of Appeals for the Fifth Circuit has disregarded the later case on the ground that

when the rule is stated in relatively strong terms, it is, like virtually every other rule, subject to exceptions. If a prior panel decision has been invalidated by the passage of a statute or intervening Supreme Court, en banc circuit, or, on issues of state law, state precedent, the court does not have to convene en banc to overrule the invalidated precedent.³⁴ The U.S. Court of Appeals for the Ninth Circuit has taken this exception farther than the other circuits, holding in 2003 that, not only are prior panels free to disregard opinions undermined by later Supreme Court opinions, but so also are district courts.³⁵

The precise limits of the intervening-authority exception can be difficult to define. For example, when a panel opinion is based on a circuit precedent that is later reversed by the Supreme Court, the exception to the law of the circuit rule applies, and the panel opinion can be disregarded by later panels as fatally undermined. The line from the panel opinion to the contrary Supreme Court opinion in that instance is clear. But sometimes the relationship between a panel opinion and later, contrary precedent is not so clear. Courts sometimes invoke a corollary to the intervening-authority exception that applies when later superior authority that is not directly on point legitimately calls into question a subsidiary tribunal's prior opinion.³⁶

the later panel lacked the power to rule in a manner contrary to the earlier opinion. *Wilson*, 658 F.2d at 1035; *see also* *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1192–93 (5th Cir. Unit A May 1981) (making the point that a later panel is without power to rule differently than an earlier panel, but determining that intervening superior authority rendered the earlier case invalid). *Contra* *Three Buoys Houseboat Vacations U.S.A. Ltd. v. Morts*, 921 F.2d 775, 779 (8th Cir. 1990) (determining, when faced with conflicting circuit precedents, that it should follow the earlier panel opinion because it was better reasoned).

33. *See, e.g.*, *United States v. Rodriguez*, 527 F.3d 221, 224–25 (1st Cir. 2008) (“[T]he law of the circuit doctrine has soft edges; it is ‘neither a straightjacket nor an immutable rule.’” (quoting *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 142 (1st Cir. 2000))). The U.S. Court of Appeals for the Seventh Circuit appears to take the most relaxed view of any of the federal circuits, saying that courts are not absolutely bound by their own prior opinions “and must give fair consideration to any substantial argument that a litigant makes for overruling a previous decision.” *Colby*, 811 F.2d at 1123.

34. *See, e.g.*, *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 441 (1st Cir. 2007) (explaining that an exception to *stare decisis* applies when a prior opinion is undermined by subsequent controlling authority, including a Supreme Court opinion, a circuit en banc opinion, or a statute); *Cooper v. Cent. & Sw. Servs.*, 271 F.3d 1247, 1251 (10th Cir. 2001) (stating that, unless a state's courts have changed the law, a prior panel decision on a question of state law is binding on a later panel); *Martin*, 254 F.3d at 577 (recognizing that a Supreme Court decision may render a prior panel decision invalid and thus empower a later panel to overrule an earlier panel's opinion); *United States v. Doe*, 819 F.2d 206, 209 n.1 (9th Cir. 1985) (explaining circumstances under which a panel opinion undermined by a later en banc opinion can be reexamined).

35. *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc). The opinion holds that neither U.S. Court of Appeals for the Ninth Circuit appellate panels nor district courts within that circuit are bound to follow prior panel or en banc opinions that are “clearly irreconcilable with the reasoning or theory of intervening higher authority.” *Id.* at 893. Interestingly, the court made this change to the law of the circuit rule with a formal en banc opinion. For a discussion of this case, *see generally*, *Recent Cases*, 117 HARV. L. REV. 719 (2003).

36. *See, e.g.*, *Eulitt ex rel. Eulitt v. Me., Dep't of Educ.*, 386 F.3d 344, 350 (1st Cir. 2004).

The circumstances justifying application of this corollary have been characterized as “hen’s-teeth rare,”³⁷ suggesting that it is not often invoked. In fact, however, the corollary has been described in more generous terms as applying when later authority, “although not directly controlling, may nevertheless offer a compelling reason for believing that the former panel, in light of new developments, would change its collective mind.”³⁸ Legitimately called into question is different from a change of mind, thus illustrating the slipperiness of this exception. The fuzzy margins of the exception only serve to underscore the nature of the law of the circuit rule as a somewhat flexible policy rather than a rigidly applied rule.

Exceptions notwithstanding, horizontal stare decisis is generally observed in the federal circuit courts through the requirement that the court sit en banc to overrule panel opinions.³⁹ The use of en banc review developed from the evolution of the federal appellate courts.⁴⁰ The circuits each originally consisted of only three judges.⁴¹ Thus, the decision of an individual three-judge panel by definition constituted the decision of the entire circuit. Over time, more judges were added to some circuits.⁴² A circuit split developed regarding whether a case could be heard by all of the judges sitting together or only by an individual three-judge panel.⁴³ The Supreme Court resolved that question in 1941 in *Textile Mills Securities Corp. v. Commissioner*,⁴⁴ holding that, notwithstanding any ambiguity in the statute authorizing three-judge panels, the federal appellate courts had the inherent authority to convene and decide cases en banc.⁴⁵

Once the question of the federal appellate courts’ power to convene en banc was resolved, the question of procedure arose. The Supreme Court did not address this issue in *Textile Mills*, presumably leaving the exercise of en banc review to the individual circuits.⁴⁶ In 1948, Congress incorporated the *Textile Mills* decision into the United States Code at 28

37. *Guzmán*, 419 F.3d at 31.

38. *Id.*

39. See *supra* note 28 (citing cases for the proposition that a federal circuit court sits en banc to overrule a prior panel opinion).

40. For a detailed history of the development of en banc review, see A. Lamar Alexander, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part I)*, 40 N.Y.U. L. REV. 563, 565–74 (1965); see also Ginsburg & Falk, *supra* note 3, at 1009–11 (setting out the history of the development of en banc review).

41. Ginsburg & Falk, *supra* note 3, at 1009 (quoting Act of Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826, 826).

42. *Id.* (quoting Act of Mar. 3, 1911, ch. 231, § 118, 36 Stat. 1131).

43. *Compare* Lang’s Estate v. Comm’r, 97 F.2d 867, 869 (9th Cir. 1938) (finding no method of rehearing a case with more than three judges), *with* Comm’r v. Textile Mills Sec. Corp., 117 F.2d 62, 67–71 (3d Cir. 1940) (determining that the court had the authority to sit en banc), *aff’d*, 314 U.S. 326 (1941).

44. 314 U.S. 326.

45. *Id.* at 331–35.

46. Alexander, *supra* note 40, at 573.

U.S.C. § 46.⁴⁷ This section of the code provides for en banc review while simultaneously affirming the primacy of the three-judge panel as the basic decisional unit of the federal appellate courts:

(a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service⁴⁸

One thing that is clear, however, is that the statute merely codifies the court's ruling.⁴⁹ The determination that the courts have the power to convene en banc, and the corresponding rules regarding stare decisis and the law of the circuit, are rules made by the courts themselves, not by legislative fiat.⁵⁰

Procedures governing en banc review were addressed after *Textile Mills*. In *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*,⁵¹ the Supreme Court established several fundamental procedural requirements applicable to en banc review, including litigants' rights to suggest that the court hear a case en banc.⁵² Although the Court further noted that the circuits should make their en banc procedures transparent to litigants, it left control over the process with the circuits themselves.⁵³ Litigants, while permitted to suggest en banc review, could not force the circuit judges' hands.⁵⁴

Procedures for en banc review appear in Federal Rule of Appellate Procedure 35 and local circuit rules. Rule 35 limits use of en banc review, providing that “[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary

47. Act of June 25, 1948, ch. 646, 62 Stat. 869, 871 (codified as amended at 42 U.S.C. § 46 (1952)); see also Alexander, *supra* note 40, at 573 (noting that 28 U.S.C. § 46 incorporated the rule from *Textile Mills Securities Corp. v. Commissioner*); Ginsburg & Falk, *supra* note 3, at 1011 & n.22 (same).

48. 28 U.S.C. § 46 (2006).

49. Barrett, *supra* note 15, at 828 (“Courts do not purport to interpret any statutory or constitutional text in the development of [horizontal] stare decisis doctrine.”).

50. *Id.*

51. 345 U.S. 247 (1953).

52. *Id.* at 268.

53. *Id.* at 250.

54. *Id.* (explaining that 28 U.S.C. § 46(c) “neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*”).

to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."⁵⁵

Although Rule 35 sets out two circumstances justifying en banc review, it does not articulate with precision the types of cases meriting en banc review. The "exceptional importance" standard is sufficiently broad so as to encompass a wide range of cases. And as the language of the rule suggests, although en banc review will "ordinarily" be granted only when one of the criteria are met, a court could undertake en banc review in other circumstances. The only circumstance in which courts say that en banc review is required is to overrule circuit precedent pursuant to the law of the circuit rule, and, as noted above, even that rule is subject to exceptions.⁵⁶ As a result, questions have arisen regarding the circumstances under which en banc review is appropriate.

One circumstance not directly addressed by the criteria concerns whether en banc review is appropriate when a decision creates intercircuit conflict. A decision creating an intercircuit conflict can be considered a question of exceptional importance because of the difficulties that inconsistencies across circuits create.⁵⁷ Questions of exceptional importance can also

55. FED. R. APP. P. 35.

56. See *supra* notes 27–39 and accompanying text.

57. Ginsburg & Falk, *supra* note 3, at 1023. The Advisory Committee notes on the 1998 amendments to Federal Rule of Appellate Procedure (FRAP) 35 discuss this issue at length:

Intercircuit conflict is cited as one reason for asserting that a proceeding involves a question of "exceptional importance." Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated. Given the increase in the number of cases decided by the federal courts and the limitation on the number of cases the Supreme Court can hear, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict. Although an en banc proceeding will not necessarily prevent intercircuit conflicts, an en banc proceeding provides a safeguard against unnecessary intercircuit conflicts.

Some circuits have had rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing en banc. An intercircuit conflict may present a question of "exceptional importance" because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved. It is not, however, the Committee's intent to make the granting of a hearing or rehearing en banc mandatory whenever there is an intercircuit conflict.

The amendment states that "a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of every other United States Court of Appeals that has addressed the issue." . . . That language contemplates two situations in which a rehearing en banc may be appropriate. The first is when a panel decision creates a conflict. A panel decision creates a conflict when it conflicts with the decisions of all other circuits that have considered the issue. If a panel decision simply joins one side of an already existing conflict, a rehearing en banc may not be as important because it cannot avoid the conflict. The second situation that may be a strong candidate for a rehearing en banc is one in which the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict.

include questions of first impression in the circuit. An individual panel clearly has the authority to decide a question of first impression.⁵⁸ From time to time, however, the circuit may find it advisable to convene en banc to resolve a question of first impression.

The indeterminacy of the criteria prompted Judge Douglas Ginsburg of the District of Columbia Circuit to characterize them as expressing “more of an attitude than a standard.”⁵⁹ Another way of evaluating the criteria justifying en banc review is to consider the purposes of such review: increasing public confidence in the judiciary, which generally applies when the case is exceptionally important to the public; improving judicial administration, in which circumstance the case is exceptionally important to the court; and correcting errors, including cases in which a panel makes an error of law or considers itself bound by an erroneous precedent, which generally involves a case that is exceptionally important to the parties.⁶⁰

Regardless of how the criteria are interpreted, it is important to remember that Rule 35 is directed toward parties and their ability to petition for en banc review. The decision to convene en banc lies solely in the judges’ discretion,⁶¹ and, in fact, most en banc review is generated sua sponte within the court.⁶² Any judge can call for a vote on en banc review.⁶³ Before a panel opinion is issued, a member of the panel can call for a vote.⁶⁴ After a panel opinion is issued, the call can come from any judge on the court.⁶⁵

Of course, en banc activity is not the only way for a judge to influence the outcome of a case. An “off-panel” judge may attempt to persuade the panel to revise its opinion to address a concern.⁶⁶ But if the disagreement cannot be resolved through informal back channels, the judge may initiate

FED. R. APP. P. 35 advisory committee notes on the 1998 amendment.

58. Policy Statement on *En Banc* Endorsement of Panel Decisions (Jan. 17, 1996), [http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Irons%20Footnote/\\$FILE/IRONS.PDF](http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Irons%20Footnote/$FILE/IRONS.PDF) [hereinafter Policy Statement].

59. Ginsburg & Falk, *supra* note 3, at 1022.

60. *Id.* at 1025–41.

61. As the Advisory Committee notes on the 1998 amendments to FRAP 35 explain,

Because of the discretionary nature of the en banc procedure, the filing of a suggestion for rehearing en banc has not required a vote; a vote is taken only when requested by a judge. It is not the Committee’s intent to change the discretionary nature of the procedure or to require a vote on a petition for rehearing en banc. The rule continues, therefore, to provide that a court is not obligated to vote on such petitions. It is necessary, however, that each court develop a procedure for disposing of such petitions because they will suspend the finality of the court’s judgment and toll the time for filing a petition for certiorari.

FED. R. APP. P. 35 advisory committee notes on the 1998 amendment.

62. Ginsburg & Falk, *supra* note 3, at 1012–13; Stephen L. Wasby, *The Supreme Court and Courts of Appeals En Bancs*, 33 MCGEORGE L. REV. 17, 19 (2002).

63. Wasby, *supra* note 62, at 19.

64. *Id.*

65. *Id.* Indeed, if the parties do not request rehearing en banc, they may be asked to brief the issue of whether the case merits en banc review after a judge initiates en banc activity, thereby reversing the typical order of activity in the case. *Id.* at 19–20.

66. *Id.* at 20.

the en banc call.⁶⁷ The call for en banc review is accompanied by a memorandum explaining the basis for the call, and the judges vote on the matter.⁶⁸ A majority of the judges must vote in favor of en banc review for the matter to proceed.⁶⁹

Once the decision to hear or rehear a case en banc has been made, the parties typically submit additional briefs.⁷⁰ In most cases, the judges will hear oral argument as well, although that is not always the case.⁷¹ All of the judges on the circuit convene together to hear argument and, as necessary, conference regarding the case.⁷²

B. *Informal En Banc Review*

Informal en banc review is a procedure by which one federal circuit court panel circulates an opinion to the full court for acquiescence in an action as a substitute for formal en banc review. It is often used when en banc review is possible, but is not required. For example, en banc review is not required when a panel addresses a question of first impression, but the panel may choose nevertheless to obtain the acquiescence of other members of the court. En banc review may also not be appropriate when an opinion creates or continues an intercircuit conflict.⁷³ A panel may, nevertheless, in this circumstance wish to obtain the acquiescence of the rest of the court in the opinion. On the other hand, sometimes informal en banc procedures are used to overrule circuit precedent. Sometimes this occurs in cases that at least arguably fall under an exception to the law of the circuit rule, but sometimes it occurs when en banc review should, according to the law of the circuit rule, be required.

In practice, what usually happens is that a panel circulates all or part of an opinion to the full court with an explanation that the opinion takes an action that would ordinarily require the court to convene en banc,

67. *Id.*

68. *Id.* at 19–20.

69. The determination of what constitutes a majority was handled on a circuit by circuit basis for many years. See Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 815–16 (1993); see also FED. R. APP. P. 35 advisory committee notes on the 2005 amendment. The revision of FRAP 35 in 2005 resolved this question in favor of the so-called “case majority” approach.

70. Wasby, *supra* note 62, at 21.

71. See ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 46 tbl.S-1 (2007), available at <http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf> (showing fourteen en banc cases decided without oral argument in 2007).

72. The exception is the Ninth Circuit, which by rule provides that en banc review is conducted by eleven of the court’s judges: the chief judge and ten additional judges selected at random from among those eligible to participate in the en banc proceeding. 9TH CIR. R. 35-3. For a discussion of this limited en banc procedure, see Pamela Ann Rymer, *The “Limited” En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317 (2006).

73. See *supra* notes 57–58 and accompanying text.

essentially with an invitation to call for en banc review.⁷⁴ If a majority agrees with the disposition or at least does not vote to hear or rehear the case en banc, the panel opinion is issued with a notation to that effect.⁷⁵ Sometimes both the action and the notation indicating approval through informal en banc review appear in the body of the opinion.⁷⁶ Sometimes the action appears in the body of the opinion and the notation of informal en banc approval appears in a footnote.⁷⁷ Sometimes both the action and the notation of informal en banc approval appear in a footnote.⁷⁸

1. Circuits Using Informal En Banc Review and Frequency of Use

Not all circuits use informal en banc review. The U.S. Courts of Appeals for the Third, Ninth, Eleventh, and Federal Circuits do not authorize or use it. Among the remaining nine circuits, the frequency of use varies considerably. Four circuits have used informal en banc review sparingly. The U.S. Court of Appeals for the Sixth Circuit used it once in 1991, and that opinion was vacated when the court decided to rehear the case using the formal en banc procedure.⁷⁹ The U.S. Court of Appeals for the Fourth Circuit used it once in 1975.⁸⁰ The U.S. Court of Appeals for the Eighth Circuit used it three times between 1978 and 2007,⁸¹ and the U.S. Court of

74. See, e.g., *Saban v. U.S. Dep't of Labor*, 509 F.3d 376, 379 (7th Cir. 2007) (noting that the panel opinion, which overruled a prior panel opinion, was circulated to the full court and no eligible judge voted for en banc review); *United States v. Brutus*, 505 F.3d 80, 87 n.5 (2d Cir. 2007) (noting that a decision abandoning the holding in a prior panel decision was circulated to all active members of the court); *United States v. Atencio*, 476 F.3d 1099, 1105 n.6 (10th Cir. 2007) (noting that a circuit panel may overrule a decision of a prior panel with the authorization of all active judges on the court); *United States v. Southerland*, 466 F.3d 1083, 1084 n.1 (D.C. Cir. 2006) (noting that the opinion had been circulated to and approved by the full court pursuant to the circuit's informal en banc review procedure); *Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 67 n.2 (1st Cir. 2004) (noting that the opinion was circulated to the active judges on the court and that none "interposed an objection to the panel's overruling of prior circuit precedent"); Ginsburg & Falk, *supra* note 3, at 1015–16 (comparing the U.S. Court of Appeals for the District of Columbia Circuit informal en banc procedure, which requires approval of a majority of judges, with the Seventh Circuit procedure, which allows a panel to overrule if a majority of judges do not object).

75. See cases cited *supra* note 74.

76. See, e.g., *Saban*, 509 F.3d at 379; *Owens v. United States*, 387 F.3d 607, 611 (7th Cir. 2004); *Coca-Cola Bottling Co. of N.Y., Inc. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 55 (2d Cir. 2001).

77. See, e.g., *United States v. Parker*, 508 F.3d 434, 436 & n.1 (7th Cir. 2007).

78. See, e.g., *United States v. Cousins*, 455 F.3d 1116, 1121 n.4 (10th Cir. 2006); *Zerilli-Edelglass v. N.Y. City Transit Auth.*, 333 F.3d 74, 81 n.7 (2d Cir. 2003); *United States v. Wilson*, 169 F.3d 418, 427 n.9 (7th Cir. 1999).

79. *Watts v. Burkhardt*, No. 89-6160, 1991 WL 261224 (6th Cir. Dec. 13, 1991), *vacated and reh'g en banc granted*, 978 F.2d 269 (6th Cir. 1992) (en banc).

80. *Bell v. United States*, 521 F.2d 713, 715 n.3 (4th Cir. 1975).

81. *Three Buoys Houseboat Vacations U.S.A. Ltd. v. Morts*, 921 F.2d 775, 779 n.5 (8th Cir. 1990); *Firestone Tire & Rubber Co. v. Risjord (In re Multi-Piece Rim Prods. Liab. Litig.)*, 612 F.2d 377, 378 n.2 (8th Cir. 1980); *United States v. Kasto*, 584 F.2d 268, 272 n.4 (8th Cir. 1978).

Appeals for the Fifth Circuit used it seven times between 1984 and 2007.⁸² In these circuits, informal en banc review is so unusual that the cases invoking it are the exceptions that prove substantial adherence to the law of the circuit rule. That is, although these courts recognize their authority to modify the law of the circuit rule, they seem to do so rarely and only on an ad hoc basis. The law of the circuit rule is strong in these circuits.

The use of informal en banc review is considerably more notable in the remaining five circuits, the U.S. Courts of Appeals for the First, Second, Seventh, Tenth, and District of Columbia Circuits. The First Circuit has used it eighteen times from 1990 to 2007, the Second Circuit seventy-one times from 1966 to 2007, the Seventh Circuit 272 times from 1969 to 2007, the Tenth Circuit twenty-nine times from 1984 to 2007, and the District of Columbia Circuit twenty-six times from 1977 to 2007.⁸³ Although the number of times informal en banc review has been used may seem small in relation to the court's entire docket, when compared with the number of en

82. *Milofsky v. Am. Airlines, Inc.*, 404 F.3d 338, 346 n.19 (5th Cir. 2005); *United States v. Vasquez-Olvera*, 999 F.2d 943, 943 n.* (5th Cir. 1993); *Estate of Farrar v. Cain*, 941 F.2d 1311, 1316 n.22 (5th Cir. 1991); *United States v. Edelman*, 873 F.2d 791, 795 n.1 (5th Cir. 1989); *Dornbusch v. Comm'r*, 860 F.2d 611, 612 n.1 (5th Cir. 1988); *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 706 n.8 (5th Cir. 1986); *Affholder, Inc. v. S. Rock, Inc.*, 746 F.2d 305, 311 (5th Cir. 1984).

83. *See infra* Appendix A for lists of cases by circuit. The figures reported here vary considerably from those of the only other compilation of informal en banc cases. *See Bennett & Pembroke, supra* note 3. That study, however, dates from 1986. To find the informal en banc cases, I used "opinion /10 circulat!" as a word search in the Westlaw database for each individual circuit (e.g., CTA1, CTA2, etc.). This is because virtually all of the cases in which informal en banc review is used contain language saying that the opinion was circulated to the full court. The search overall was too broad in that it retrieved some number of cases that did not concern informal en banc procedures, such as those involving circulation of publications or circulatory disorders. In the Seventh Circuit, which has established its process by rule, I also searched by rule number. I also Shepardized and KeyCited cases cited as authority for the procedure to find additional cases in which the procedure was invoked. Finally, I searched by West key number. Under the topic Courts, key number 90(2), cases discussing the scope of the law of the circuit rule are collected. I reviewed all of these cases for any informal en banc cases. Notwithstanding these multiple search techniques, it is possible that my research missed informal en banc cases in which no language indicates that the opinion was circulated, in which the terms opinion and circulate appeared more than ten words apart from each other, and which were not located by alternative means. If anything, this search may undercount slightly the number of informal en banc cases.

For the formal en banc cases, I used statistics compiled by the Administrative Office of the U.S. Courts. I aggregated those cases decided by the en banc court with additional briefing and oral argument with those decided without additional briefing or oral argument to compile the total number of cases considered in formal en banc proceedings. The Administrative Office of the U.S. Courts compiles en banc statistics only as far back as 1970–1971. To locate earlier en banc cases for the U.S. Courts of Appeals for the Second and Seventh Circuits, I searched for "in banc" or "en banc" with a date restriction. This search was overinclusive in that it retrieved every case in which those terms appeared (such as those citing en banc cases) as well as cases decided en banc. Nevertheless, because it is possible that some en banc cases lack the term en banc and indicate en banc status only through the list of judges hearing the case, this search may have failed to identify some en banc cases decided before the Administrative Office began compiling statistics.

banc dispositions, its use is, relatively speaking, significant. Figure 1 shows the comparisons of the number of formal and informal en banc hearings across circuits.⁸⁴

FIGURE 1: COMPARISON OF THE NUMBER OF FORMAL AND INFORMAL EN BANC CASES

	Date of First Informal En Banc Case	Number of Informal En Banc Cases Through 2007	Number of Formal En Banc Cases During That Time
1st	1990	18	38
2d	1966	71	52
4th	1975	1	286
5th	1984	7	267
6th	1991	1	73
7th	1969	272	196
8th	1978	3	249
10th	1984	29	176
D.C.	1977	26	113

2. The Development of Informal En Banc Procedures

Courts typically develop rules of stare decisis by judicial opinion.⁸⁵ Indeed, this has been characterized as one of the few areas of judicially created federal common law.⁸⁶ And there is no question that courts have the authority to develop principles of stare decisis as part of their Article III judicial power. Determining decisionmaking processes is integral to the process of deciding cases on the merits and, thus, is within the courts' province.⁸⁷

As the following analysis of the development of informal en banc procedures shows, however, informal en banc review has developed in an

84. Appendix A lists informal en banc cases by circuit along with the total number issued. Statistics on formal en banc opinions are available for 1997 through 2007 from the Administrative Office of the United States Courts by viewing Table S.1 in each year's *Annual Report of the Director*. See *Judicial Business of the United States Courts*, <http://www.uscourts.gov/judbususc/judbus.html> (last visited Oct. 12, 2009). The Administrative Office's statistics for 1970–1996 are on file with the *Fordham Law Review*, and those for earlier years were compiled manually as noted in note 83, *supra*.

85. Sloan, *supra* note 15, at 712–13.

86. Barrett, *supra* note 15, at 825.

87. Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 212–14 (2001); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007); see also Sloan, *supra* note 15, at 713 (discussing the use of local procedural rules to authorize nonprecedential opinions).

ad hoc, idiosyncratic way in most circuits with little or no justification. The District of Columbia Circuit has promulgated a policy governing use of informal en banc procedures,⁸⁸ and the Seventh Circuit authorizes the procedure by local rule.⁸⁹ Otherwise, aside from occasional nods to the law of the circuit rule, the remaining circuits do not attempt in any meaningful way to justify the use of informal en banc procedures or to define with clarity when the use of the procedures is appropriate. Typically, at some point a panel says it can, when circumstances require, overrule a prior panel opinion without resort to the en banc procedure. Then later cases cite back to the original case as authority. But no statute or Supreme Court authority authorizes it, and few of the cases that employ the procedure analyze the reasons or basis for departing from the law of the circuit rule. Presumably, in the absence of direction to the contrary, the same criteria justifying formal en banc review (intracircuit conflict or a question of exceptional importance, including as appropriate, decisions creating or continuing intercircuit conflict) would also justify informal review. But this is not explained in the opinions invoking informal en banc procedures.

A review of the development of informal en banc procedures for each circuit that uses them follows. Because the Fourth, Sixth, and Eighth Circuits have used informal en banc procedures so rarely⁹⁰ (and in the Sixth Circuit the opinion was later withdrawn when the case was reheard en banc),⁹¹ they cannot truly be said to have developed informal en banc procedures; therefore, they are not discussed here.

In the First Circuit, the development of the procedure is fairly clear, and the court provides some limited justification for the creation of the procedure. Although the First Circuit has used informal en banc procedures since 1990,⁹² the procedure did not firmly take root until 1992, when the court decided *Gallagher v. Wilton Enterprises, Inc.*,⁹³ and *Trailer Marine Transport Corp. v. Rivera Vazquez*.⁹⁴ Although these are not the only cases cited in support of the procedure, they are cited frequently⁹⁵ and contain

88. See *infra* notes 138–42 and accompanying text.

89. See *infra* notes 115–20 and accompanying text.

90. See *supra* p. 728, fig.1.

91. *Watts v. Burkhardt*, No. 89-6160, 1991 WL 261224 (6th Cir. Dec. 13, 1991), *vacated and reh'g en banc granted*, 978 F.2d 269 (6th Cir. 1992) (en banc).

92. *United States v. Bucuvalas*, 909 F.2d 593 (1st Cir. 1990).

93. 962 F.2d 120 (1st Cir. 1992).

94. 977 F.2d 1 (1st Cir. 1992).

95. As of 2007, twelve cases cited one or both of the opinions as authority for informal en banc review: *Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 67 n.2 (1st Cir. 2004); *Crowe v. Bolduc*, 365 F.3d 86, 89 n.1 (1st Cir. 2004); *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 138 n.1 (1st Cir. 2000); *Hollingsworth & Vose Co. v. A-P-A Transp. Corp.*, 158 F.3d 617, 620 n.5 (1st Cir. 1998); *Grant-Chase v. Comm'r, N.H. Dep't of Corr.*, 145 F.3d 431, 435 n.3 (1st Cir. 1998); *Kelley v. Airborne Freight Corp.*, 140 F.3d 335, 357 n.15 (1st Cir. 1998); *In re Grand Jury Subpoenas*, 123 F.3d 695, 697 n.2 (1st Cir. 1997); *Ionics, Inc. v. Elmwood Sensors, Inc.*, 110 F.3d 184, 187 n.3 (1st Cir. 1997); *United States v. Indelicato*, 97 F.3d 627, 629 n.2 (1st Cir. 1996); *N.L.R.B. v. Hosp. San Rafael, Inc.*, 42 F.3d 45, 51 n.1 (1st Cir. 1994); *Wright v. Park*, 5 F.3d 586, 591 n.7 (1st Cir. 1993); *United States v. Rivera*, 994 F.2d 942, 951 (1st Cir. 1993).

explanations of the procedure, unlike some other cases. Thus, they seem to have become the foundation for the use of the procedure in the First Circuit. *Gallagher* justifies the use of informal en banc review under limited circumstances:

Because this case required us to reexamine [an earlier circuit precedent], we would ordinarily have convened the en banc court. We have, however, in rare instances, where it has become reasonably clear that a prior precedent of this court was erroneously decided or is no longer good law, achieved the same result more informally by circulating the proposed panel opinion to all the active judges of the court for pre-publication comment. *See*,] e.g., *United States v. Bucuvalas*, 909 F.2d 593, 598 n.9 (1st Cir. 1990). While this practice is to be used sparingly and with extreme caution, we have employed it in the special circumstances of this case, with the result that the entire court has approved the overruling of [the earlier circuit precedent] on the point at issue.⁹⁶

Bucuvalas, however, does not explain or justify the procedure; it simply notes that, because it overrules a prior case, it was circulated to the full court.⁹⁷ Thus, *Bucuvalas* is simply an example of the procedure, not a justification of it.

Trailer Marine refers back to *Gallagher* for the procedure, but its footnote contains language that then became the template for future cases:

Following the procedure described in *Gallagher v. Wilton Enterprises, Inc.*, . . . the proposed panel opinion in this case was circulated to all active judges of the court prior to publication, and none posed an objection to the panel's treatment of [an earlier case]. This procedure, needless to say, does not convert this opinion into an *en banc* decision nor preclude a suggestion of rehearing *en banc* on any issue in the case, whether or not related to the panel's treatment of [the earlier case].⁹⁸

The Second Circuit's first informal en banc cases appear to have been decided in 1966.⁹⁹ The procedure was used again once in 1972¹⁰⁰ and once in 1975,¹⁰¹ but it did not firmly take root until 1979. In that year alone, the procedure was used three times,¹⁰² and it has been used regularly since then.¹⁰³ Although some opinions cite earlier opinions in invoking the procedure, many do not, and there does not appear to be any single case or

96. 962 F.2d at 124 n.4.

97. 909 F.2d at 598 n.9.

98. 977 F.2d at 9 n.5. (citing *Gallagher*, 962 F.2d at 124 n.4).

99. *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *United States v. Malafrente*, 357 F.2d 629 (2d Cir. 1966). The two cases were companion appeals.

100. *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972).

101. *In re Phillips*, 510 F.2d 126 (2d Cir. 1975).

102. *Boothe v. Hammock*, 605 F.2d 661 (2d Cir. 1979); *Grimes v. United States*, 607 F.2d 6 (2d Cir. 1979); *Lee v. Joseph E. Seagram & Sons, Inc.*, 592 F.2d 39 (2d Cir. 1979).

103. *See supra* p. 728, fig.1.

series of cases establishing the procedure or its acceptable uses.¹⁰⁴ Many of the opinions simply state that the opinion has been circulated to all active members of the court.¹⁰⁵ Some also note that no judge sought en banc consideration.¹⁰⁶ The statement in *United States v. Brutus*¹⁰⁷ provides the most thorough explanation of informal en banc review that the Second Circuit has provided:

We recognize that the law of the circuit doctrine dictates that we are “bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.” We have therefore circulated this opinion to all active members of this court before filing.¹⁰⁸

This nod to the law of the circuit rule is virtually the only reference to the requirements of horizontal stare decisis in any of the Second Circuit’s informal en banc cases. Interestingly, the court simultaneously invokes the law of the circuit rule and implicitly deems the informal circulation of its opinion as the functional equivalent of en banc review.

The Fifth Circuit’s approach is similar to the Second Circuit’s. It first used an informal en banc procedure in 1984 in *Affholder, Inc. v. Southern Rock, Inc.*¹⁰⁹ The court stated that changes in the law undermined the holdings of two prior Fifth Circuit opinions, giving the panel the authority to overrule them:

Mindful of the law of the circuit rule, which forbids one panel to overrule another save when a later statute or Supreme Court decision has changed the applicable law, this opinion has been considered not only by all members of the panels in those two cases but also by all judges in active service who were not members of those two panels. By unanimous

104. For example, *United States v. Brutus*, 505 F.3d 80, 87 n.5 (2d Cir. 2007), cites *United States v. Gonzales*, 420 F.3d 111, 132 n.18 (2d Cir. 2005), and *United States v. Mincey*, 380 F.3d 102, 103 n.1 (2d Cir. 2004), without explanation upon invoking the procedure. *Gonzales*, in turn, cites *Mincey* and *United States v. Crosby*, 397 F.3d 103, 105 n.1 (2d Cir. 2005), to invoke the procedure, again without explanation. *Crosby* cites no authority for the procedure. *Crosby*, 397 F.3d at 105 n.1. *Mincey* cites *Tesser v. Board of Education*, 370 F.3d 314, 320 n.3 (2d Cir. 2004), and *Adeleke v. United States*, 355 F.3d 144, 155 n.9 (2d Cir. 2004), with no explanation. *Tesser* also cites *Adeleke*, among other cases, *Tesser*, 370 F.3d at 320 n.3, and so on. The trail of unexplained citations leads back to other unexplained citations, but nowhere is any justification for or explanation of the purpose of informal en banc review provided.

105. See, e.g., *Crosby*, 397 F.3d at 105 n.1; *United States v. Walker*, 353 F.3d 130, 134 n.2 (2d Cir. 2003), *vacated on other grounds*, *Nnebe v. United States*, 534 F.3d 87 (2d Cir. 2008); *New Pac. Overseas Group (U.S.A.) Inc. v. Excal Int’l Dev. Corp.*, 252 F.3d 667, 670 n.1 (2d Cir. 2001); *United States v. Mapp*, 170 F.3d 328, 338 n.15 (2d Cir. 1999).

106. See, e.g., *Zerilli-Edelglass v. N.Y. City Transit Auth.*, 333 F.3d 74, 81 n.7 (2d Cir. 2003).

107. 505 F.3d 80 (2d Cir. 2007).

108. *Id.* at 87 n.5 (quoting *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004)) (additional citations omitted).

109. 746 F.2d 305 (5th Cir. 1984).

agreement the court has sua sponte reconsidered those two opinions, authorized their overruling, and chosen to adhere to this opinion.¹¹⁰

Later opinions also reference the law of the circuit rule while simultaneously disregarding it, effectively treating informal circulation of an opinion as equivalent to formal en banc review.¹¹¹ Later opinions that create intercircuit conflict, rather than rejecting prior circuit precedent, also note a policy of circulating opinions in that circumstance.¹¹²

In the Seventh Circuit, the earliest use of informal en banc review appears to have been in 1969.¹¹³ Initially, panels circulated opinions to the active judges on the court in lieu of formal en banc review without any reference to authority or explanation of the procedure.¹¹⁴ In 1976, the court promulgated Local Rule 16(e),¹¹⁵ which provided as follows:

A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or A majority did not

110. *Id.* at 311.

111. *See, e.g.*, *Dornbusch v. Comm'r*, 860 F.2d 611, 612 n.1 (5th Cir. 1988) (recognizing that one panel cannot overrule another, formally circulating the opinion with a notation regarding the panel's proposed departure from prior circuit precedent, and deeming lack of objection or request for en banc review as authorization to depart from the prior opinion); *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 706 n.8 (5th Cir. 1986) (recognizing that one panel cannot overrule another even on questions of state law in diversity cases but treating lack of objection or request for rehearing en banc as authorization to depart from a prior opinion).

112. *See, e.g.*, *Milofsky v. Am. Airlines, Inc.*, 404 F.3d 338, 346 n.19 (5th Cir. 2005); *United States v. Vasquez-Olvera*, 999 F.2d 943, 943 n.* (5th Cir. 1993); *Estate of Farrar v. Cain*, 941 F.2d 1311, 1316 n.22 (5th Cir. 1991). The source of this policy is not clear. The only reference in the Fifth Circuit's Local Rules and Internal Operating Procedures to policies relating to conflicts with prior circuit precedent concerns description of the bases for en banc review, 5TH CIR. R. 35, and criteria for publication of opinions, 5TH CIR. R. 47.5.

113. *United States v. Brown*, 411 F.2d 930, 934 n.5 (7th Cir. 1969).

114. *See, e.g.*, *Korman v. United States*, 486 F.2d 926, 932 n.11 (7th Cir. 1973); *United States v. Nordlof*, 440 F.2d 840, 845 n.10 (7th Cir. 1971), *vacated*, 454 F.2d 739 (7th Cir. 1971) (relying on intervening Supreme Court authority); *Chi. & Nw. Ry. Co. v. United Transp. Union*, 422 F.2d 979 (7th Cir. 1970).

115. It is unclear exactly when the rule was promulgated. The first reference to it in an opinion was in 1977. *Zeigler Coal Co. v. Local Union No. 1870*, 566 F.2d 582, 585 n.** (7th Cir. 1977). A copy of the local circuit rules containing rules effective July 1, 1976, includes rule 16(e). PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 127 (1981 ed.) (on file with the Fordham Law Review). Thus, it appears that the rule was promulgated sometime in 1976.

favor) a rehearing in banc on the question of (*e.g.*, *overruling Doe v. Roe.*)¹¹⁶

In 1987, the rule was renumbered as Rule 40(f), but with no change in its language.¹¹⁷ In 1996, the rule was renumbered again as Rule 40(e).¹¹⁸ The language is identical to earlier versions of the rule, except that rehearings before the full court are referred to as “en banc” rather than “in banc.”¹¹⁹ Cases employing the procedure do not explain or justify it; they simply contain a version of the footnote required by local rule along with a citation to the relevant rule.¹²⁰ The Seventh Circuit has, however, expressed a fairly relaxed view of the principle of horizontal stare decisis, saying in essence that it must seriously consider any colorable argument to overturn prior precedent.¹²¹ Although this is not necessarily inconsistent with the requirement that overruling requires formal en banc review, it does perhaps evidence a philosophy of greater willingness to reconsider prior precedent than in other circuits. It is interesting to note, however, that a number of informal en banc cases have occurred despite split votes on whether to hear the case en banc,¹²² including some cases with published dissents from denials of en banc review.¹²³

116. 7TH CIR. R. 16(e), *in* PRACTITIONER’S HANDBOOK, *supra* note 115, at 127.

117. 7TH CIR. R. 40(f), *in* PRACTITIONER’S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 126 (1987 ed.) (on file with the Fordham Law Review).

118. Historical research into local circuit rules is difficult because earlier versions are rarely archived. The current version of the rule appears in Seventh Circuit Local Rule 40(e). Cases began referring to Rule 40(e) instead of Rule 40(f) in 1996. *See, e.g.*, *Hogan v. McBride*, 74 F.3d 144, 147 (7th Cir. 1996). Thus, the renumbering apparently occurred in 1996.

119. 7TH CIR. R. 40(e). One interesting aspect of this rule is its placement within the local rules. Federal Rule of Appellate Procedure 40 and 7th Circuit Local Rule 40 both concern panel rehearings, not rehearing en banc. It seems unusual that a provision authorizing informal en banc review to overrule prior precedent would be included with a rule on panel rehearing instead of being included with 7th Circuit Local Rule 35, governing en banc review.

120. *See, e.g.*, *Spiegla v. Hull*, 371 F.3d 928, 942 n.7 (7th Cir. 2004); *United States v. Mitrione*, 357 F.3d 712, 718 n.2 (7th Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005); *Gibson v. West*, 201 F.3d 990, 994 n.3 (7th Cir. 2000).

121. *See, e.g.*, *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (stating that a court is “not absolutely bound by [its own prior decisions], and must give fair consideration to any substantial argument that a litigant makes for overruling a previous decision”).

122. *See, e.g.*, *Ali v. Gonzales*, 502 F.3d 659, 661 n.1 (7th Cir. 2007) (four judges voted to rehear the case en banc); *Owens v. United States*, 387 F.3d 607, 611 (7th Cir. 2004) (three judges voted to rehear the case en banc); *Smith v. Office of Civilian Health & Med. Program of Uniformed Health Servs.*, 97 F.3d 950, 950 n.1 (7th Cir. 1996) (four judges voted to rehear the case en banc); *Lester v. City of Chicago*, 830 F.2d 706, 713 n.6 (7th Cir. 1987).

123. *Walker v. O’Brien*, 216 F.3d 626, 640 (7th Cir. 2000) (Easterbrook, J., Posner, C.J., & Manion, J., dissenting from denial of rehearing en banc); *French v. Duckworth*, 178 F.3d 437, 448 (7th Cir. 1999) (Easterbrook, J., joined by Posner, C.J., & Manion, J., dissenting from denial of rehearing en banc), *overruled by Miller v. French*, 530 U.S. 327 (2000).

The earliest Tenth Circuit case to employ an informal en banc procedure was decided in 1984.¹²⁴ In that and subsequent cases, the court notes that the opinion was circulated because it overrules prior decisions and that all or a majority of the judges agreed with the disposition on the particular question of law.¹²⁵ The procedure has not been explained in detail by the Tenth Circuit, although *United States v. Atencio*¹²⁶ provides minimal discussion of the procedure:

A panel decision may overrule a point of law established by a prior panel through an en banc footnote by obtaining authorization from all active judges on the court. . . . This opinion has been circulated to all active members of this court, and it is our unanimous decision to overturn the point of law articulated in [an earlier case] that a defendant does not forfeit his right to appeal by failing to object to [a particular type of] error at sentencing. . . . For these reasons, the en banc court now overrules [the earlier case] and holds that parties must object to [the] error at the time of sentencing.¹²⁷

This explanation is interesting for two reasons. First, the court cites *United States v. Meyers*¹²⁸ to support the use of informal en banc review, which is interesting because *Meyers* is only an example of a case invoking informal en banc review. *Meyers* does not explain or justify the procedure.¹²⁹ This is yet another example of the trail of citations like those in the First Circuit cases that lead to nowhere.¹³⁰ Second, the *Atencio* opinion characterizes its overruling of the earlier case as the action of the en banc court even though *Atencio* is a panel decision and the overruling was done without true en banc review.

The District of Columbia Circuit first used the informal en banc procedure in 1977 in *United States v. Sheppard*.¹³¹ Informal en banc review was not formalized, however, until 1981. In *Irons v. Diamond*,¹³² the court ruled in a long-standing and much-litigated dispute over a Freedom of Information Act request to obtain records relating to granted patent applications. The case had bounced up and down between the

124. *EEOC v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984).

125. *United States v. Flowers*, 464 F.3d 1127, 1130 n.1 (10th Cir. 2006); *Amoco Prod. Co. v. Heimann*, 904 F.2d 1405, 1414 n.8 (10th Cir. 1990); *Gaddis*, 733 F.2d at 1377 n.3.

126. 476 F.3d 1099 (10th Cir. 2007).

127. *Id.* at 1105 n.6 (citing *United States v. Meyers*, 200 F.3d 715, 721 n.3 (10th Cir. 2000)).

128. 200 F.3d 715.

129. *United States v. Meyers* says only this about its use of informal en banc review: "This opinion has been circulated to all active members of this court, and it is their unanimous decision to overturn the following point of law articulated in" two prior cases. *Id.* at 716 n.3.

130. See *supra* notes 92–98 and accompanying text.

131. 569 F.2d 114 (D.C. Cir. 1977). That decision announced a new evidentiary standard in rape cases. It simply included a general notation that the opinion rejected the evidentiary standard applied in some earlier, unspecified opinions and was, therefore, circulated to full court, which voted unanimously against en banc review. *Id.* at 119 n.18.

132. 670 F.2d 265 (D.C. Cir. 1981).

district court and the District of Columbia Circuit several times.¹³³ In prior decisions, denominated *Irons II* and *Dann*, the court reached inconsistent decisions regarding the application of 35 U.S.C. § 122. The government sought to distinguish *Irons II* from *Dann*, but the court thought that the proffered distinctions were not persuasive and elected to address the conflict between the two cases directly.¹³⁴ The court then rejected the interpretation of the statute in *Irons II* and adopted the interpretation from *Dann*.¹³⁵ In so doing, the court dropped a footnote with the following language: “The foregoing part of the division’s decision, because it resolves an apparent conflict between two prior decisions, has been separately considered and approved by the full court, and thus constitutes the law of the circuit.”¹³⁶

After that case, the court began using “so-called *Irons* footnote[s]” in cases that would otherwise ordinarily have required en banc review.¹³⁷ Fifteen years later, the District of Columbia Circuit promulgated a “Policy Statement on *En Banc* Endorsement of Panel Decisions,” dated January 17, 1996. Prior to January 2008, this policy was an internal court document that was unavailable to the public, although it was cited and extensively quoted in a published opinion in 1999.¹³⁸ Beginning in January 2008, the court made the document public.¹³⁹ The policy first expressly acknowledges that the procedure is a substitute for formal en banc review to be used when “action by the court *en banc* may be called for, but the circumstances of the case or the importance of the legal questions presented do not warrant the heavy administrative burdens of full *en banc* hearing.”¹⁴⁰ It then goes on say that use of the procedure is appropriate when the court is

- (1) resolving an apparent conflict in the prior decisions of panels of the court;
- (2) rejecting a prior statement of law which, although arguably dictum, warrants express rejection to avoid future confusion;
- (3) overruling an old or obsolete decision which, although still technically valid as precedent, has plainly been rendered obsolete by subsequent legislation or other developments; and

133. *Id.* at 266–67.

134. *Id.* at 267–68.

135. *Id.* at 268.

136. *Id.* at 268 n.11.

137. Ginsburg & Falk, *supra* note 3, at 1015–16 (internal quotation marks omitted).

138. *In re Sealed Case*, 181 F.3d 128, 143–44, 146 (D.C. Cir. 1999) (Henderson, J., concurring).

139. Letter from Mark J. Langer, Clerk of Court, U.S. Court of Appeals for the D.C. Circuit, to author (Jan. 18, 2008) (on file with the Fordham Law Review). The Policy Statement on *En Banc* Endorsement of Panel Decisions is now posted on the court’s website. Policy Statement, *supra* note 58.

140. Policy Statement, *supra* note 58, at 1.

(4) overruling a more recent precedent which, due to an intervening Supreme Court decision, or the combined weight of authority from other circuits, a panel is convinced is clearly an incorrect statement of current law.¹⁴¹

The District of Columbia Circuit is the only circuit to come right out and say that it uses the informal procedure when the case technically requires action by the en banc court but that the case is “just not important enough” to justify the effort.¹⁴²

3. Uses of Informal En Banc Review

Although the courts themselves (other than the District of Columbia Circuit) do not clearly specify when the use of informal en banc procedures is justified, an analysis of the cases in which it has been invoked reveals six circumstances under which it is typically used: (1) when the opinion creates or continues an intercircuit conflict; (2) when the opinion expressly overrules a prior panel precedent that has been rendered invalid by intervening authority (a U.S. Supreme Court opinion; an en banc opinion by the circuit; a federal statute or regulation; or a change to state law when the state’s law provides the rule of decision); (3) when the opinion resolves an intracircuit conflict or ambiguity without expressly overruling prior cases, including cases in which a rule of law is modified or prior precedent is limited or rejected without being formally overruled; (4) when the opinion addresses a question of first impression or states a rule or policy where none existed before; (5) when the opinion expressly overrules prior panel precedent that has not otherwise been rendered invalid; and (6) when the case has some other unusual aspect to it, such as an unusual procedural history.¹⁴³ In terms of subject matter, the courts use informal en banc procedures slightly more often in civil cases than in criminal cases, with criminal cases constituting roughly forty-one percent of informal en banc cases and civil cases accounting for roughly fifty-nine percent.¹⁴⁴ For purposes of this calculation, criminal cases are defined broadly to include direct appeals, habeas corpus petitions, and challenges to prison conditions.

The charts below show the breakdown by circuit of the nature of the informal en banc caseload.¹⁴⁵ The categorization of the cases is not without qualification. Sometimes it was hard to tell exactly why the court undertook informal en banc review.¹⁴⁶ In other cases, the court took

141. *Id.*

142. Wald, *supra* note 31, at 486 n.30.

143. See *infra* p. 738, fig.2 and Appendix A.

144. See *infra* Appendix A. Criminal cases are identified by asterisk. Of a total of 428 informal en banc cases (including one each from the U.S. Courts of Appeals for the Fourth and Sixth Circuits), 174 (40.65%) were criminal and 254 (59.35%) were civil.

145. For a list of cases by circuit with their individual categorizations, see Appendix A, *infra*.

146. See, e.g., Gaertner v. United States, 763 F.2d 787, 788 n.1 (7th Cir. 1985) (noting that the opinion was circulated pursuant to the local rules without explaining why);

multiple actions, such as overruling panel precedent and creating an intercircuit conflict on another issue.¹⁴⁷ In those cases, I had to choose a category for the opinion; I did not count any opinion more than once. And in still other cases, the court's language was ambiguous. If the court "rejects" or "abrogates" a prior opinion that is in conflict with other circuit precedent, is it resolving an intracircuit conflict without overruling any case, or is it necessarily overruling a panel precedent even if it does not say so expressly?¹⁴⁸ This required some judgment calls, using the context of the case, the Shepard's and KeyCite treatment of the earlier opinion, and later cases' characterization of the action. There is room for disagreement with some of the judgments I made,¹⁴⁹ but even with some disagreement at the margins, the statistics below provide an interesting snapshot of the ways the federal appellate courts use informal en banc procedures.

Dickinson v. Heinold Sec., Inc., 661 F.2d 638, 638 n.b (7th Cir. 1981) (noting that the opinion was circulated pursuant to the local rules without explaining why). Most often, these cases were categorized as resolving a question not previously addressed in the circuit because, although not specifically stated in the opinion, that is what they appeared to do.

147. See, e.g., Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998) (overruling three panel opinions on one issue, overruling a fourth panel opinion on a second issue, overruling a fifth panel opinion that had been undermined by later Supreme Court authority, and creating intercircuit conflicts with the U.S. Courts of Appeals for the Third and Ninth Circuits); Donnelly v. Yellow Freight Sys. Inc., 874 F.2d 402, 402 n.1 (7th Cir. 1989) (noting that the opinion both overruled prior circuit precedent and created a conflict with the Ninth Circuit). These cases are categorized as overruling prior panel precedent.

148. For examples compare the following cases. In *United States v. Canoy*, 38 F.3d 893 (7th Cir. 1994), the court states that it "depart[s] from" a portion of an earlier ruling. *Id.* at 907 n.12. Reading the case and reviewing later treatment, it is clear that the earlier case was effectively overruled, so *Canoy* is categorized as an overruling opinion. By contrast, in *Cement Division, National Gypsum Co. v. City of Milwaukee*, 31 F.3d 581 (7th Cir. 1994), the court "depart[s] from" a portion of an earlier case. *Id.* at 586. Reading that case and looking at later treatment, it is clear that the earlier case is still valid and that its language was merely clarified in this opinion. Thus, *Cement Division* is categorized as resolving a conflict or ambiguity. In *Pence v. Rosenquist*, 573 F.2d 395 (7th Cir. 1978), the majority states that it is "withdrawing the categorical holding" of a prior case, in part in light of later Supreme Court precedent, *id.* at 400 n.8, while the dissent characterizes the majority's opinion as a "retreat from" the prior case. *Id.* at 400 (Pell, J., concurring in part and dissenting in part). Is the earlier decision overruled in part or simply clarified? I characterized the opinion as overruling a case invalidated by intervening authority.

149. Two general decisions I made about categorizing cases are worth noting. One concerns cases challenging criminal sentences imposed under the federal sentencing guidelines after the Supreme Court determined that the guidelines were advisory rather than mandatory in *United States v. Booker*, 543 U.S. 220 (2005). The federal appellate courts have had to decide a number of cases in which a defendant failed to challenge the sentencing guidelines, was sentenced pursuant to the guidelines, and then appealed the sentence post-*Booker* on the ground that failure to challenge the guidelines was plain error. See, e.g., *United States v. Castillo*, 406 F.3d 806 (7th Cir. 2005). This small subset of cases does not always fit neatly into the six categories articulated above, but most are characterized as presenting a question of first impression because of the unique circumstances of each case. Additionally, cases involving the appellate courts' supervisory authority over district courts and attorneys practicing before the federal courts are generally treated as addressing questions of first impression because they state rules or policies where none existed before.

FIGURE 2: NATURE OF INFORMAL EN BANC CASES BY CIRCUIT

First Circuit—Of the 18 informal en banc cases, 7 were criminal, and 11 were civil.

Total informal en banc decisions, 1990–2007		18
Creating or continuing intercircuit conflict (I)	0	
Resolving a question of first impression or stating a rule or policy where none existed before (Q)	2	
Resolving an intracircuit conflict or ambiguity or modifying a rule without overruling prior cases (including rejecting prior panel precedent without overruling it) (C)	3	
Overruling precedent undermined by intervening superior authority (U)	5	
Overruling panel precedent in force (O)	7	
Miscellaneous (M)	1	
Total formal en banc cases, 1990–2007		38

Second Circuit—Of the 71 informal en banc cases, 35 were criminal, and 36 were civil.

Total informal en banc decisions, 1966–2007		71
Creating or continuing intercircuit conflict (I)	0	
Resolving a question of first impression or stating a rule or policy where none existed before (Q)	19	
Resolving an intracircuit conflict or ambiguity or modifying a rule without overruling prior cases (including rejecting prior panel precedent without overruling it) (C)	19	
Overruling precedent undermined by intervening superior authority (U)	16	
Overruling panel precedent in force (O)	13	
Miscellaneous (M)	4	
Total formal en banc cases, 1966–2007		52

Fifth Circuit—Of the 7 informal en banc cases, 2 were criminal, and 5 were civil.

Total informal en banc decisions, 1984–2007		7
Creating or continuing intercircuit conflict (I)	3	
Resolving a question of first impression or stating a rule or policy where none existed before (Q)	0	
Resolving an intracircuit conflict or ambiguity or modifying a rule without overruling prior cases (including rejecting prior panel precedent without overruling it) (C)	1	
Overruling precedent undermined by intervening superior authority (U)	0	
Overruling panel precedent in force (O)	3	
Miscellaneous (M)	0	
Total formal en banc cases, 1984–2007		267

*Seventh Circuit*¹⁵⁰—Of the 272 informal en banc cases, 105 were criminal, and 167 were civil.

Total informal en banc decisions, 1969–2007		272
Creating or continuing an intercircuit conflict (I)	99	
Resolving a question of first impression or stating a rule or policy where none existed before (Q)	42	
Resolving an intracircuit conflict or ambiguity or modifying a rule without overruling prior cases (including rejecting prior panel precedent without overruling it) (C)	27	
Overruling precedent undermined by intervening superior authority (U)	24	
Overruling panel precedent in force (O)	73	
Miscellaneous (M)	7	
Total formal en banc cases, 1969–2007		196

150. Because the Seventh Circuit has used informal en banc review more often than all other circuits combined, the sheer number of opinions means that many of the examples cited throughout this Article come from that circuit. Indeed, the Seventh Circuit's extensive use of informal en banc review provides a case study in both the advantages and disadvantages of regular use of the procedure.

Eighth Circuit—Of the 3 informal en banc cases, 1 was criminal, and 2 were civil.

Total informal en banc decisions, 1978–2007	3
Creating or continuing intercircuit conflict (I)	0
Resolving a question of first impression or stating a rule or policy where none existed before (Q)	0
Resolving an intracircuit conflict or ambiguity or modifying a rule without overruling prior cases (including rejecting prior panel precedent without overruling it) (C)	0
Overruling precedent undermined by intervening superior authority (U)	0
Overruling panel precedent (O)	3
Miscellaneous (M)	0
Total formal en banc cases, 1978–2007	249

Tenth Circuit—Of the 29 informal en banc cases, 16 were criminal, and 13 were civil.

Total informal en banc decisions, 1984–2007	29
Creating or continuing intercircuit conflict (I)	0
Resolving a question of first impression or stating a rule or policy where none existed before (Q)	0
Resolving an intracircuit conflict or ambiguity or modifying a rule without overruling prior cases (including rejecting prior panel precedent without overruling it) (C)	3
Overruling precedent undermined by intervening superior authority (U)	6
Overruling panel precedent (O)	19
Miscellaneous (M)	1
Total formal en banc cases, 1984–2007	176

District of Columbia Circuit—Of the 26 informal en banc cases, 7 were criminal, and 19 were civil.

Total informal en banc decisions, 1977–2007		26
Creating or continuing intercircuit conflict (I)	0	
Resolving a question of first impression or stating a rule or policy where none existed before (Q)	0	
Resolving intracircuit conflict or ambiguity or modifying a rule without overruling prior cases (including rejecting prior panel precedent without overruling it) (C)	13	
Overruling precedent undermined by intervening superior authority (U)	6	
Overruling panel precedent (O)	7	
Miscellaneous (M)	0	
Total formal en banc cases, 1977–2007		113

II. ADVANTAGES AND DISADVANTAGES OF INFORMAL EN BANC PROCEDURES

A. Advantages

The primary advantage of informal en banc procedures is that they bring the full court's attention to a greater number of cases than would be possible if the court were restricted to formal en banc review. This results in greater intracircuit consistency, improved efficiency, and greater collegiality within the court.

Consider the alternative. In a significant percentage of cases in which the courts elect to use informal en banc procedures, the panel could avoid en banc review altogether. In resolving a question of first impression or creating an intercircuit conflict, a panel can, unless it considers the question one of exceptional importance, rule without any form of en banc review.¹⁵¹ Taking the extra step of circulating the decision to the full court and obtaining the acquiescence of at least a majority of the other judges helps maintain intracircuit consistency: by getting most or all members of the court on board from the start, the chances of a later, conflicting panel opinion are reduced.¹⁵²

151. See FED. R. APP. P. 35 (setting out criteria for en banc review).

152. For example, the Second Circuit used informal en banc review in *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991), although a footnote indicating that the opinion was circulated to the full court did not explain why. *Id.* at 414 n.1 *United States v. Novod*, 923 F.2d 970 (2d Cir. 1991), explains that *Schwartz* and *Novod* were both circulated to the full

In cases involving conflicts among circuit authorities, panels could also avoid en banc review in many circumstances by making nitpicky distinctions among cases, aggressively characterizing statements in prior opinions as dicta,¹⁵³ ignoring inconsistent authority,¹⁵⁴ or rejecting or disregarding such authority without expressly overruling it. These actions, while expedient, create disarray within the circuit and leave future panels with the option of doing the same or seeking en banc review to straighten out the law. Outdated cases that have been effectively undermined by later authorities but have not been formally overruled, as well as outlier cases that are contrary to other circuit precedents, become “derelicts on the waters of the law”¹⁵⁵ if left unaddressed. By using informal en banc review, the appellate courts can promote intracircuit consistency¹⁵⁶ and efficiency.¹⁵⁷ Informal en banc review provides a way for appellate courts

court on the question of the proper interpretation of the federal mail and wire fraud statutes. *Id.* at 973. The opinion goes on to explain that two of the three judges in *Novod* disagreed with *Schwartz* but felt bound to follow it based on the outcome of the informal en banc review. *Id.*

153. See Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 23–24 (2002) (discussing the potential for judges to use finespun distinctions and aggressive claims of dictum to avoid following prior nonprecedential opinions). Indeed, even in the context of informal en banc review, courts have made questionable characterizations of overruled statements in prior opinions as dictum. Ginsburg & Falk, *supra* note 3, at 1016 (noting that a statement that determined the outcome of a prior case was characterized as “a ‘passing and conclusory remark’” by the informal en banc opinion that overruled the prior case (quoting *Hobson v. Wilson*, 737 F.2d 1, 16 & n.46 (D.C. Cir. 1984))).

154. See, e.g., Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 942–48 (1991) (discussing Ninth Circuit cases that failed to cite contrary precedent).

155. *Wright v. Park*, 5 F.3d 586, 590 (1st Cir. 1993) (quoting *Ala. Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341, 357 (1951) (Frankfurter, J., concurring)).

156. See Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 582–84 (1989).

157. Some informal en banc opinions addressed circuit conflicts directly instead of trying to finesse the language. See, e.g., *United States v. Hamilton*, 499 F.3d 734, 737 (7th Cir. 2007) (overruling an outlier case, *United States v. Bessesen*, 445 F.2d 463 (7th Cir. 1971)); *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 543–43 (7th Cir. 2006) (not overruling any case, but clarifying language from prior opinions that was a source of confusion); *Milofsky v. Am. Airlines, Inc.*, 404 F.3d 338, 346 n.19 (5th Cir. 2005) (circulating an opinion that created a conflict with the Sixth Circuit); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 355 (2d Cir. 2000) (rejecting dictum from *Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926 (2d Cir. 1992), in favor of the earlier test for jurisdiction in federal copyright claims, as stated in *T. B. Harms Co. v. Eliscu*, 338 F.2d 823 (2d Cir. 1964)); *Byrd v. Reno*, 180 F.3d 298, 302 n.* (D.C. Cir. 1999) (circulating the opinion because the holding may be inconsistent with circuit dicta); *In re Flannery*, 186 F.3d 143 (2d Cir. 1999) (adopting a new policy regarding sanctions for attorney misconduct); *Hollingsworth & Vose Co. v. A-P-A Transp. Corp.*, 158 F.3d 617, 620 (1st Cir. 1998) (“[W]e think it better candidly to disavow the reasoning” of a prior opinion instead of relying on a contrary opinion that was distinguishable from the prior opinion); *United States v. Cruz*, 156 F.3d 366, 372 n.6 (2d Cir. 1998) (explaining that a prior decision to the contrary was not controlling because the statement was dictum and treating resolution of the case as one of first impression); *United States v. Indelicato*, 97 F.3d 627, 629 n.2 (1st Cir. 1996) (circulating an opinion for informal en banc review even though an earlier en banc opinion

to address circuit conflicts and eliminate outdated authority that has been gradually eroded, even if facially still valid, without resort to formal en banc review.¹⁵⁸

Consider also the time and effort involved in en banc review. Convening en banc consumes significant judicial resources. Given the caseloads of the federal appellate courts, dealing with outdated precedent or precedent undermined by later authority with an informal en banc process is more efficient than full en banc consideration. Parties are often called upon to provide additional briefing and present second oral arguments, which adds to the expense and hassle of litigation. The amount of time it takes to convene all of the circuit judges together, hear the case, assign authorship, and involve the judges in the drafting and review processes can be significant, which adds to delay in resolving cases.¹⁵⁹

Informal en banc review can also encourage collegiality within the circuit. Judges say that collegiality is vital for the efficient operation of the court.¹⁶⁰ Most formal en banc rehearings are initiated *sua sponte*, not in response to party motions.¹⁶¹ Calls for formal en banc review can create tensions among the judges.¹⁶² Respect for the panel and the presumption of finality require limits on formal en banc review.¹⁶³ Using informal review procedures allows judges who are not on the panel to raise concerns or suggest changes in language to a panel's opinion without having to invoke

had effectively undermined the panel opinion whose status was at issue); *Bohn v. Park City Group, Inc.*, 94 F.3d 1457, 1460 n.2 (10th Cir. 1996) (circulating an opinion that overruled a case decided in 1953 that had been overruled *sub silentio* by a later en banc opinion); *Lester v. City of Chicago*, 830 F.2d 706, 713 (7th Cir. 1987) (explaining that the panel chooses to overrule a prior panel opinion "rather than attempt to distinguish and isolate [the earlier panel opinion] (and engender the confusion that results from having two inconsistent standards govern the same claims)"); *Irons v. Diamond*, 670 F.2d 265, 268 (D.C. Cir. 1981) (rejecting the government's attempt to distinguish two inconsistent cases and resolving the conflict directly); *Lee v. Joseph E. Seagram & Sons, Inc.*, 592 F.2d 39, 44 (2d Cir. 1979) (overruling an outlier case from 1944 inconsistent with later circuit precedent).

158. Bennett & Pembroke, *supra* note 3, at 558 (explaining that informal en banc review is efficient because it resolves an issue in a single opinion and focuses the court's attention on that issue); Ginsburg & Falk, *supra* note 3, at 1043 (justifying the use of informal en banc review on efficiency grounds); Wald, *supra* note 31, at 486 n.30 (noting that informal en banc review is reserved for efficient overruling of precedents that are obsolete or unpopular).

159. Ginsburg & Falk, *supra* note 3, at 1018–22 (detailing the costs and other burdens associated with formal en banc review); *see also* Wald, *supra* note 31, at 482–83.

160. Ginsburg & Falk, *supra* note 3, at 1016–18 ("Harmonious circuit life . . . depends upon a high degree of mutual trust among the judges, and preferably a healthy respect for each other's intelligence."); *id.* at 1013 ("The court, like any team, functions best when each member feels responsible to each of the others, and responsible for the performance of the whole."); Wald, *supra* note 31, at 488. *See generally* Deanell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO ST. L.J. 585 (1995).

161. *See supra* note 62 and accompanying text.

162. Bennett & Pembroke, *supra* note 3, at 543; Wald, *supra* note 31, at 488.

163. Ginsburg & Falk, *supra* note 3, at 1021. Judge Douglas H. Ginsburg and Donald Falk also argue that too little en banc review threatens collegiality by creating the prospect of rogue panels subject only to weak, informal sanctions for deterrence. *Id.*

the formal en banc procedure and make more work for everyone on the court or create discord on the court.

Also, interestingly, informal en banc review could provide at least a partial solution to the problem of nonprecedential opinions. A major argument judges have made against making nonprecedential opinions binding is that it would take years of en banc work to undo what may be wrong opinions.¹⁶⁴ If the opinions could be undone with informal en banc review, however, this argument loses some of its force, and the idea of giving nonprecedential opinions at least some precedential force becomes possible.¹⁶⁵

B. Disadvantages

Although the use of informal en banc review as a substitute for formal en banc review has some advantages, it also creates several problems. The primary problem is the absence of standards governing use of informal en banc review to overturn circuit precedent. Without at least some general notion of the appropriate application of the procedure, it becomes impossible to tell which cases are subject to the law of the circuit rule and which are not. This causes the use of informal procedures to become arbitrary, if not in actuality then in appearance, undermining the principle of horizontal stare decisis.¹⁶⁶ Other problems include use of footnotes to hide the law,¹⁶⁷ potential negative effects on traditionally marginalized groups,¹⁶⁸ diminished collegiality on the court,¹⁶⁹ lack of meaningful opportunity for parties to participate in the process,¹⁷⁰ uncertainty about the

164. Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1483–84 (2005); Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 937 (2008). Schiltz describes judicial concerns about uses of nonprecedential opinions in the context of opposition to FRAP 32.1, which eliminated citation restrictions on nonprecedential opinions:

Several judges who oppose Rule 32.1 have told me privately that what really concerns them is not that unpublished opinions will be cited, but that courts will eventually be forced to treat unpublished opinions as precedential. The courts of appeals have issued hundreds of thousands of unpublished opinions, and judges have no idea what is in them. . . . Judges are terrified that they will wake up one day and find themselves bound by this mountain of unpublished opinions.

Schiltz, *supra*, at 1483. Requiring courts to use the en banc procedure to correct every mistake in nonprecedential opinions issued over the years would create decades of work. *Id.* at 1484.

165. See Sloan, *supra* note 164, at 930 (proposing giving nonprecedential opinions an intermediate “overrulable” status).

166. See *infra* Part III.B.1.

167. See *infra* Part III.B.2.

168. See *infra* Part III.B.3.

169. See *infra* Part III.B.4.

170. See *infra* Part III.B.5.

weight of informal en banc opinions,¹⁷¹ and full court endorsement of opinions based on less than thorough review.¹⁷²

1. Lack of Standards

With the exception of the District of Columbia Circuit, none of the federal circuits that use informal en banc procedures have articulated specific guidelines governing the procedures' application.¹⁷³ The federal appellate courts have considerable discretion in determining when to conduct formal en banc review, and whether a particular case is one of "exceptional importance" can be in the eye of the beholder.¹⁷⁴ Nevertheless, the courts have used informal en banc review in cases that seem like they should fall in the exceptional importance category. Further, all circuits agree that, with limited exceptions, formal en banc review is necessary to overrule prior circuit precedent.¹⁷⁵ Yet even in this context, it is simply unclear when a case merits formal en banc review and when one merits informal en banc review. A review of cases reveals little rhyme or reason for the use of informal en banc review. Informal en banc review has been used to overrule both long-standing¹⁷⁶ and recent¹⁷⁷ precedent, lines of precedent¹⁷⁸ and individual cases,¹⁷⁹ and questions of constitutional,¹⁸⁰

171. See *infra* Part III.B.6.

172. See *infra* Part III.B.7.

173. See *supra* Part II.B. Although the Seventh Circuit's local rules says its informal en banc procedure is to be used to overrule panel opinions, it does not differentiate among the types of circumstances justifying overruling the way the District of Columbia Circuit's policy statement does. 7TH CIR. R. 40(e). General statements, like those from the U.S. Courts of Appeals for the First Circuit, stating that informal en banc review is to be "in rare instances" when prior precedent is "erroneously decided," *infra* note 96 and accompanying text, do not provide meaningful standards governing the use of the procedure.

174. FED. R. APP. P. 35; see *supra* notes 55–60 and accompanying text.

175. See *supra* notes 28–35 and accompanying text.

176. See, e.g., *United States v. Mitrione*, 357 F.3d 712, 718 & n.2 (7th Cir. 2004) (overruling *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928)), *vacated on other grounds*, 543 U.S. 1097 (2005); *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 9 & n.5 (1st Cir. 1992) (overruling *Buscaglia v. Ballester*, 162 F.2d 805 (1st Cir. 1947)); *Cont'l Corp. v. Aetna Cas. & Sur. Co.*, 892 F.2d 540, 540 n.* (7th Cir. 1989) (overruling *Paddleford v. Fidelity & Casualty Co. of New York*, 100 F.2d 606 (7th Cir. 1938), regarding the construction of an exclusion clause in an insurance contract); *United States v. Read*, 658 F.2d 1225 (7th Cir. 1981) (overruling a 1977 case regarding burden of persuasion on withdrawal from a conspiracy by reconsidering a 1912 Supreme Court case).

177. See, e.g., *United States v. Ortiz*, 143 F.3d 728, 729 & n.1 (2d Cir. 1998) (overruling *United States v. Collado*, 106 F.3d 1097 (2d Cir. 1997), decided the previous year); *Lester v. City of Chicago*, 830 F.2d 706, 713 & n.6 (7th Cir. 1987) (overruling *Gumz v. Morrisette*, 772 F.2d 1395 (7th Cir. 1985), decided two years earlier).

178. *United States v. Flowers*, 464 F.3d 1127, 1130 n.1 (10th Cir. 2006) (overruling seven cases dating back to 1991 concerning whether certain statutory requirements were jurisdictional).

179. *Dornbusch v. Comm'r*, 860 F.2d 611, 612 n.1 (5th Cir. 1988).

180. *Spiegla v. Hull*, 371 F.3d 928, 941–42 (7th Cir. 2004) (overruling a line of eight prior cases decided between 1987 and 2003 by disavowing "the requirement that a plaintiff alleging First Amendment retaliation has the burden of providing but-for causation").

statutory,¹⁸¹ procedural,¹⁸² and state law.¹⁸³ The lack of articulated standards results in arbitrary use of informal en banc review.

A particularly striking example is *Russ v. Watts*.¹⁸⁴ In that case, the Seventh Circuit considered whether parents of a twenty-two-year-old college student killed by a police officer had a liberty interest in their relationship with their adult son for purposes of a § 1983 claim against the state.¹⁸⁵ In a previous case, *Bell v. City of Milwaukee*,¹⁸⁶ the court held that a parent's "constitutional liberty interest in his relationship with his [adult] son" was violated when his son was killed by police.¹⁸⁷ Twenty-one years later, in *Russ*, the Seventh Circuit overruled *Bell* using the informal en banc procedure.¹⁸⁸ The court explained that several other circuits had considered the question of the constitutional dimensions of a parent's right to a relationship with an adult child and had reached the opposite conclusion than the Seventh Circuit did in *Bell*.¹⁸⁹ The court then explained its reason for revisiting and rejecting *Bell*:

An analysis of the decisions of our sister circuits as well as a reexamination of our own rationale in *Bell* convinces us that *Bell* was wrongly decided. We do not make such a declaration lightly. Although we must give considerable weight to our prior decisions, we are not bound by them absolutely and may overturn Circuit precedent for compelling reasons. . . . Other circuits' rejection of our position provides one such compelling reason. As we have previously explained:

When a number of other circuits reject a position that we have taken, and no other circuit accepts it, the interest in avoiding unnecessary intercircuit conflicts comes into play; and if we are asked to reexamine our position, we can hardly refuse. That is not to say that reexamination will cause us to relinquish the position. . . . But if upon conscientious reexamination we are persuaded that the other circuits have the better of the argument, we should abandon our position in order to spare the Supreme Court extra work.

. . . .

That *Bell* stands alone causes us to reconsider its holding. We now see that our conclusion that Dolphus Bell's parental liberty interest was

181. *Fed. Sav. & Loan Ins. Corp. v. Ticktin*, 832 F.2d 1438 (7th Cir. 1987), *rev'd*, 490 U.S. 82 (1989); *Lorion v. U.S. Nuclear Regulatory Comm'n*, 712 F.2d 1472 (D.C. Cir. 1983).

182. *United States v. Jacobson*, 15 F.3d 19, 21–22 (2d Cir. 1994).

183. *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 706 n.8 (5th Cir. 1986); *Huff v. White Motor Corp.*, 565 F.2d 104 109–10 & n.7 (7th Cir. 1977).

184. 414 F.3d 783 (7th Cir. 2005).

185. *Id.* at 783.

186. 746 F.2d 1205 (7th Cir. 1984), *overruled by* *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005).

187. *Id.* at 1243.

188. 414 F.3d at 784 n.1.

189. *Id.* at 787–88.

violated by the killing of his son was not well grounded in the Constitution or Supreme Court case law.¹⁹⁰

Whether one agrees or disagrees with the substance of *Russ*, the court's decision to revisit its prior opinion in *Bell* is certainly justifiable, and its authority to do so is unquestioned.¹⁹¹ But the question remains: Why overrule *Bell* using an informal procedure rather than by convening the court en banc? No judge voted to hear the case en banc,¹⁹² presumably meaning that all agreed with the outcome,¹⁹³ but unanimity alone is not a sound justification for deviating from the formal en banc procedure. *Bell* was not in conflict with other circuit precedent, and although other circuits had ruled differently, the outcome in *Russ v. Watts* was hardly a foregone conclusion. Indeed, the court needed close to six printed pages of analysis to explain why it was overruling *Bell*.¹⁹⁴ This seems like precisely the sort of important change to the law justifying en banc review.¹⁹⁵

Another notable example is *Felzen v. Andreas*,¹⁹⁶ which overrules prior panel opinions on three separate procedural issues. It first concludes that nonparties cannot appeal an adverse judgment in a shareholder derivative suit, overruling three cases.¹⁹⁷ It then states that nonparty shareholders cannot appeal in a derivative action, overruling another case.¹⁹⁸ As a final matter, the panel determines that its jurisdictional holding cannot be prospective only, overruling yet another case, albeit one that had been rendered invalid by intervening Supreme Court precedent.¹⁹⁹ Again, one is left to wonder why formal en banc review was not warranted. An opinion

190. *Id.* at 788 (quoting *United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995)). *United States v. Hill*, the case cited in *Russ v. Watts* to support the panel's decision to overrule *Bell v. City of Milwaukee*, is an informal en banc case as well. In *Hill*, however, the government agreed that the earlier opinion that the panel overruled was erroneously decided and no longer constituted the government's position on the issue. *Hill*, 48 F.3d at 232. Of course, in *Russ*, the plaintiffs did not agree with the court's treatment of the earlier case.

191. *See supra* notes 23–26.

192. *Russ*, 414 F.3d at 784 n.1.

193. It is possible, however, that there was disagreement over the outcome. *See infra* notes 251–58 (discussing cases in which unanimous votes regarding rehearing en banc masked disagreement on the court).

194. *Russ*, 414 F.3d at 785–91.

195. *See* FED. R. APP. P. 35 (stating that en banc review is appropriate for questions of exceptional importance). For another example, see *United States v. Nordlof*, 440 F.2d 840, 845 n.10 (7th Cir. 1971), *vacated*, 454 F.2d 739 (7th Cir. 1971) (en banc), in which the panel overruled a prior panel opinion regarding conscientious objector status of persons drafted into military service. *Nordlof*, in particular, seems like it should have been decided with formal en banc review given the events and political atmosphere at the time. Although the opinion was later vacated en banc, that occurred as a result of intervening Supreme Court precedent and was done through an order with no analysis.

196. 134 F.3d 873 (7th Cir. 1998).

197. *Id.* at 875 (overruling *Armstrong v. Board of School Directors of Milwaukee*, 616 F.2d 305 (7th Cir. 1980), *Patterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976), and *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970)).

198. *Id.* at 876 (overruling *Tryforos v. Icarian Development Co., S. A.*, 518 F.2d 1258 (7th Cir. 1975)).

199. *Id.* at 877 (overruling *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984)).

that overrules no fewer than five prior panel opinions on three separate issues is the type of significant change in the law meriting the formal consideration of the full court.²⁰⁰

Felzen's overruling of multiple cases raises the question of use of informal en banc review to overturn lines of authority. Changing a rule established by a line of cases runs contrary to the very heart of horizontal stare decisis and the consistency it is supposed to engender.²⁰¹ This is especially true when the panel must choose between competing lines of authority; resolving an intracircuit conflict is one of the specific situations justifying formal en banc review under Federal Rule of Appellate Procedure (FRAP) 35.²⁰² Entire lines of cases can hardly be characterized as minor precedential annoyances,²⁰³ which informal en banc review is supposed to address. And yet, informal en banc review is used to change rules in ways that overrule established lines of authority.

Felzen is not an isolated example. In *United States v. Durrive*,²⁰⁴ the panel overruled at least thirteen cases on the test for measuring the sufficiency of evidence of a defendant's participation in a conspiracy and took a position that the Fifth Circuit adopted by en banc opinion.²⁰⁵ In *Spiegla v. Hull*,²⁰⁶ a First Amendment retaliation case, the court said it "disavow[ed] the requirement that a plaintiff alleging First Amendment retaliation has the burden of proving but-for causation" as a line of eight prior cases had required.²⁰⁷ The court said the overruled cases were contrary to the majority of relevant Seventh Circuit precedent but did not employ en banc review to resolve the intracircuit conflict.²⁰⁸ Similarly, in

200. Other examples include *Walker v. O'Brien*, 216 F.3d 626 (7th Cir. 2000), in which the court used informal en banc review because one portion of the opinion overruled in part a prior panel opinion and two other portions addressed important administrative issues regarding habeas corpus review, *Korman v. United States*, 486 F.2d 926 (7th Cir. 1973), which overruled three prior panel opinions on two separate issues, and *United States v. Cousins*, 455 F.3d 1116, 1121 n.4 (10th Cir. 2006), which overruled an unspecified number of cases and listed three as examples of those its ruling invalidated.

201. See *supra* note 21 and accompanying text.

202. FED. R. APP. P. 35.

203. Wald, *supra* note 31, at 486 n.30.

204. 902 F.2d 1221 (7th Cir. 1990).

205. *Id.* at 1225. The panel first traced the origins of the Seventh Circuit's "slight evidence" rule, analyzing the cases on which it was based and explaining the approaches taken by other circuits. *Id.* at 1225–26. The court then adopted the "substantial evidence" test, explaining why this test was more consistent with Supreme Court precedent. *Id.* at 1227.

206. 371 F.3d 928 (7th Cir. 2004).

207. *Id.* at 941–42 ("Therefore, we disavow the requirement that a plaintiff alleging First Amendment retaliation has the burden of proving but-for causation as recited in the following cases": *Galdikas v. Fagan*, 342 F.3d 684, 696 (7th Cir. 2003); *Abrams v. Walker*, 307 F.3d 650, 654 (7th Cir. 2002); *Love v. City of Chicago Board of Education*, 241 F.3d 564, 569 (7th Cir. 2001); *Thomsen v. Romeis*, 198 F.3d 1022, 1027 (7th Cir. 2000); *Johnson v. University of Wisconsin–Eau Claire*, 70 F.3d 469 (7th Cir. 1995); *O'Connor v. Chicago Transit Authority*, 985 F.2d 1362, 1368 (7th Cir. 1993); *Rakovich v. Wade*, 850 F.2d 1180, 1190 (7th Cir. 1988); and *Button v. Harden*, 814 F.2d 382, 383 (7th Cir. 1987)).

208. *Id.* at 942.

Binder v. Long Island Lighting Co.,²⁰⁹ the court used informal en banc review to resolve a conflict between two lines of authority regarding the appealability of an order granting a new trial on the ground that the verdict was against the weight of the evidence. *Johnson v. Apfel*²¹⁰ overruled six prior cases regarding the degree of specificity with which a claimant for disability benefits must bring issues to a hearing examiner's attention in order to preserve the issues for judicial review. In *Lorion v. U.S. Nuclear Regulatory Commission*,²¹¹ the District of Columbia Circuit resolved a conflict between two inconsistent lines of authority regarding the scope of its subject matter jurisdiction under a federal statute.

Nor have the federal appellate courts limited themselves to overruling cases on subsidiary issues when they use informal en banc review. *Metropolitan Life Insurance Co. v. Christ*²¹² announces, "This appeal raises one issue: Should we overrule *Rollins*?" The court answers in the affirmative, overruling the prior panel opinion in *Rollins v. Metropolitan Life Insurance Co.*²¹³ The court then uses four and a half pages of analysis to explain why *Rollins* conflicts with a federal statute, decisions from other circuits, and a Supreme Court case before overruling it.²¹⁴ In *Federal Savings and Loan Insurance Corp. v. Ticktin*,²¹⁵ the court considered the federal district court's jurisdiction to entertain a case in which the FLSIC was a party, the sole issue on appeal. The case came to the court of appeals through a provision that confers discretionary jurisdiction to accept an interlocutory appeal when the case involves a controlling question of law about which substantial grounds for difference of opinion exist.²¹⁶ The *Ticktin* panel accepted jurisdiction and overruled an earlier panel opinion to hold that the district court lacked jurisdiction,²¹⁷ a ruling later reversed by

209. 57 F.3d 193, 202 (2d Cir. 1995), *overruled on other grounds by* Fisher v. Vassar Coll., 114 F.3d 1332, 1340 (2d Cir. 1997) (en banc).

210. 189 F.3d 561, 562–63 (7th Cir. 1999).

211. 712 F.2d 1472, 1478–79 (D.C. Cir. 1983) (noting the court's inability to reconcile the rationale of two prior opinions with its holding in a third opinion and an administrative agency's interpretation of the law in light of the federal statute conferring jurisdiction).

212. 979 F.2d 575, 577 (7th Cir. 1992).

213. 863 F.2d 1346 (7th Cir. 1988), *overruled by* Metro. Life Ins. Co. v. Christ, 979 F.2d 575 (7th Cir. 1992).

214. *Christ*, 979 F.2d at 577–82. The verbiage associated with the overruling of a case is not a perfect proxy for the importance of an issue. Sometimes unimportant issues are complicated and require significant explanation, and sometimes courts gloss over important issues with minimal or cryptic analysis. Nevertheless, when the analysis of an issue spans multiple pages, it suggests that the issue is more involved than the less important issues to which informal en banc review is supposed to be confined. *See, e.g.*, Russ v. Watts, 414 F.3d 783, 785–91 (7th Cir. 2005) (using approximately five and a half pages of analysis to justify overruling a prior panel opinion); United States v. Durrive, 902 F.2d 1221, 1225–29 (7th Cir. 1990) (using roughly three and a half pages of analysis to resolve a conflict between two lines of authority).

215. 832 F.2d 1438 (7th Cir. 1987), *rev'd*, 490 U.S. 82 (1989).

216. 28 U.S.C. § 1292(b) (2006). For discussion of this and other exceptions to the final order doctrine, see generally Amy E. Sloan, *Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process*, 35 U. BALT. L. REV. 43 (2005).

217. *Ticktin*, 832 F.2d at 1446 n.3.

the Supreme Court. If a question is subject to enough dispute and is significant enough for discretionary interlocutory appeal and if it involves overruling circuit precedent, it is difficult to see why it would not justify formal en banc review.²¹⁸

This is obviously not a complete catalog of all informal en banc cases, but the examples illustrate the problems associated with the lack of articulated standards defining when informal en banc review is appropriate. It is impossible to tell why these cases merited informal en banc review instead of formal en banc review. They involve overruling prior precedent. They meet the standards for formal en banc review as set out in FRAP 35. As compared with the cases cited in the prior section—overruling a single outdated case that goes in a different direction than the rest of circuit precedent, rejecting an interpretation of dicta that had the potential to direct the development of circuit precedent in unexpected ways, announcing a new policy for addressing attorney misconduct²¹⁹—these examples seem like precisely the sorts of cases that should have been subject to formal en banc review. Without at least some criteria for determining which cases are eligible to be overruled with informal en banc disposition, the procedure can be and is used arbitrarily.

The lack of standards also undermines the law of the circuit rule, thereby weakening the principle of horizontal stare decisis in a way that threatens judicial legitimacy. When the courts start developing exceptions to the principle of stare decisis, they risk heading down a slippery slope because there are no external checks on the use of the procedures. The courts themselves are both the creators and enforcers of the rules, as well as the exceptions to the rules.²²⁰ The lack of meaningful guidelines defining the appropriate use of informal en banc review creates the risk that informal procedures will eclipse formal en banc review, effectively vitiating the law of the circuit rule.

Concern regarding the effect of informal en banc review on the law of the circuit rule has not escaped judicial notice. In *Watts v. Burkhardt*,²²¹ the dissent was based on failure to adhere to the law of the circuit rule, not on the merits of the decision. After reciting the requirement that the court convene en banc to overrule a panel opinion, the dissent explained that, merits aside, the use of informal en banc review “eviscerates the law of this

218. See Ginsburg & Falk, *supra* note 3, at 1031–32 & nn.127–28 (explaining that even opinions that are exceptionally important only to the parties are appropriate cases for formal en banc review); Wald, *supra* note 31, at 486 n.29 (noting that judges may call for formal en banc review in cases that, although not significant for the development of circuit law, are exceptionally important to the parties).

219. See cases cited *supra* note 157.

220. Bradley Scott Shannon, *May Stare Decisis Be Abrogated by Rule?*, 67 OHIO ST. L.J. 645, 690–91 (2006) (identifying the difficulty of having judges in charge of evaluating the validity of rules of precedent of their own making).

221. No. 89-6160, 1991 WL 261224, at *9–11 (6th Cir. Dec. 13, 1991) (Contie, J., dissenting), *vacated and reh'g en banc granted*, 978 F.2d 269 (6th Cir. 1992) (en banc) (overruling *Manion v. Michigan Board of Medicine*, 765 F.2d 590 (6th Cir. 1985)).

circuit in regard to overruling Sixth Circuit precedents, which is necessary in order to ensure the finality of our decisions.”²²² Judge Karen LeCraft Henderson articulated similar concerns in connection with the District of Columbia Circuit’s informal en banc review process:

I believe our *Irons* footnote procedure has serious flaws. It has evolved from an expedient device to reconcile inconsistent circuit holdings into a summary method of overruling unambiguous circuit precedent, without any of the safeguards or formalities attending the *en banc* process. A three-judge panel determines that full-court consideration is warranted and non-panel members concur without benefit of briefing or argument. The resulting decision is then announced by footnote. Reasoned decisionmaking and stare decisis call for a more deliberate process. If we wish to change our precedent, we should invoke the *en banc* mechanism expressly authorized for that purpose by the Federal Rules of Appellate Procedure.²²³

The response to this is that the courts would not forego formal en banc review altogether; they simply use informal en banc procedures to overrule circuit precedent as a convenience in the limited circumstances in which it is appropriate to do so. The problem with this argument is that it is one that has been raised before—in the context of nonprecedential opinions. Now nonprecedential opinions pose a significant threat to the principles of stare decisis and the legitimacy of the courts.²²⁴ In fact, the parallels between both the justifications for and the risks of issuing nonprecedential opinions and those associated with informal en banc review are striking.

The reasons articulated for issuing nonprecedential opinions are as follows: they are more efficient for resolving “clear cut” cases without the substantial effort that drafting precedential opinions requires; courts can distinguish cases that require precedential opinions from those that do not; even though the opinions are not binding precedent, judges will give them the same careful attention and consideration that they do precedential opinions.²²⁵ All of the same could be said of informal en banc procedures: they are more efficient for overruling outdated, invalidated, or simply wrong precedent without the substantial effort that full en banc review requires; courts can distinguish which cases require formal en banc review to be overruled from those that do not; even though judges do not engage in full en banc review, they give the cases careful attention and consideration.

Now consider what has happened with nonprecedential opinions. What was intended to be a limited exception to the practice of issuing binding

222. *Id.* at *11.

223. *In re Sealed Case*, 181 F.3d 128, 146 n.5 (D.C. Cir. 1999) (Henderson, J., concurring).

224. See generally Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004); Richman & Reynolds, *supra* note 2; Sloan, *supra* note 15.

225. See generally K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397 (2001); see also Richman & Reynolds, *supra* note 2, at 1182–85.

opinions is now the predominant mode of disposition for cases resolved on the merits in the federal appellate courts. Almost eighty-five percent of opinions are nonprecedential.²²⁶ It is entirely possible that informal en banc procedures will take the same course, gradually eclipsing formal en banc review so that the exception becomes the norm. It is already the case in two circuits (the Second²²⁷ and Seventh²²⁸) that informal en banc cases outnumber formal en banc cases. It is not out of the question that informal en banc review will become, like nonprecedential opinions, an uncomfortable problem from which the federal appellate courts must avert their gaze.²²⁹ It is indeed ironic that a procedure with similar risks has the potential to help solve the nonprecedential opinion problem.²³⁰ But solving one legitimacy problem with another suspect procedure might just compound the problem. As the saying goes, two wrongs don't make a right.

One could argue that the law of the circuit rule has already been eroded beyond recognition as a result of nonprecedential opinions. Given the limited contexts in which the law of the circuit rule applies (in only roughly fifteen percent of cases decided on the merits), concerns about a couple of hundred informal en banc cases may be misplaced. The relatively low number of informal en banc cases, however, is what makes addressing the problem easy in comparison to the nonprecedential opinion problem. If resolving a few more cases each year with formal en banc review solves a host of legitimacy concerns and preserves the law of the circuit rule, that seems like the better course of action.

2. Hiding the Law

When courts use informal en banc review, they usually indicate that fact by footnote. As noted above, sometimes the footnote simply notes the use

226. During the twelve months ending September 30, 2007, 83.5% of cases terminated on the merits in twelve of the federal circuits were disposed of by unpublished opinion. ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR, *supra* note 71, at 48 tbl.S-3. For these twelve circuits, the percentage ranged from a low of 55% in the Seventh Circuit to a high of 93% in the U.S. Court of Appeals for the Fourth Circuit. *Id.* The U.S. Court of Appeals for the Federal Circuit does not report the number of nonprecedential opinions it issues to the Administrative Office of the U.S. Courts. *See id.* One study, however, concluded that the Federal Circuit resolved 77% of its cases from October 1, 1982, through October 23, 2003, with nonprecedential opinions, with annual figures ranging from a low of 62% in 1983 to a high of 84% in 1996. Beth Zeitlin Shaw, Comment, *Please Ignore This Case: An Empirical Study of Nonprecedential Opinions in the Federal Circuit*, 12 GEO. MASON L. REV. 1013, 1028 (2004).

227. *See supra* p. 738, fig.2 (Second Circuit chart).

228. *See supra* p. 739, fig.2 (Seventh Circuit chart). Indeed, the Seventh Circuit has used informal en banc review more times than all of the other circuits combined.

229. Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 73 (2005) (making the "avert their gaze" comment in the context of nonprecedential opinions and FRAP 32.1).

230. *See supra* notes 164–65 and accompanying text.

of the procedure, but sometimes the overruling itself goes in a footnote.²³¹ Indeed, sometimes entire dissents from rehearing en banc appear in the footnote as well.²³² At other times, cryptic footnotes inserted with the caption to the case simply indicate informal en banc review without saying why or for which issue.²³³

When that happens, the court is obscuring the law. Courts simply should not be hiding action as significant as overruling prior cases or announcing new rules of law in their footnotes. They have been known to consider the arguments parties raise by footnote to be waived.²³⁴ In fact, one informal en banc case that overrules prior opinions by footnote itself refuses to consider an argument that a party raised only by footnote.²³⁵ Why, then, should courts be able to hide some of the most significant actions they take in footnotes? If they are going to change the law, they should do so prominently and clearly so that people can tell what the law is.

This is not simply a matter of appearances. Legal research is more difficult when important principles are relegated to footnotes. Case research is accomplished primarily by subject (using digests or other subject compilations of case summaries) and by words in the document (using electronic word searches).²³⁶ When the content is in the footnotes, it may not be reflected in the headnotes, which are then used to create West key number and other subject compilations.²³⁷ The use of word searches may capture cases the digesting process misses. But even that requires

231. See *supra* notes 77–78 and accompanying text.

232. This is most common in the Seventh Circuit. See, e.g., *Deppe v. Tripp*, 863 F.2d 1356, 1368 n.* (7th Cir. 1988) (deciding a case with informal en banc review with the entire dissent from denial of rehearing en banc appearing in the footnote); *Lester v. City of Chicago*, 830 F.2d 706, 713 n.6 (7th Cir. 1987) (dissenting reasoning included entirely within the footnote); *Huff v. White Motor Corp.*, 565 F.2d 104, 109 n.7 (7th Cir. 1977) (dissenting reasoning and a comment from another judge included entirely within a footnote); *Calvert Fire Ins. Co. v. Will*, 560 F.2d 792, 796 n.5 (7th Cir. 1977) (dissenting view entirely in a footnote), *rev'd*, 437 U.S. 655 (1978).

233. Again, this is most common in the Seventh Circuit. See, e.g., *United States v. West*, 670 F.2d 675, 675 n.* (7th Cir. 1982) (containing a footnote placed in the caption immediately following the date of the opinion providing only as follows: “Pursuant to Circuit Rule 16, this opinion has been circulated among all judges of this Court in regular active service. No judge favored a hearing *en banc*”); *Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638, 638 n.b (7th Cir. 1981) (containing a footnote placed in the caption immediately following the date of the opinion providing only as follows: “Pursuant to Circuit Rule 16(e), this opinion has been circulated among all of the active judges of the court. No judge requested a rehearing *en banc*.”).

234. See, e.g., *United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001); *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir. 1999); *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989); *United States v. Bentley*, 825 F.2d 1104, 1109 (7th Cir. 1987).

235. *United States v. Mapp*, 170 F.3d 328, 332 n.8 (2d Cir. 1999).

236. AMY E. SLOAN, *BASIC LEGAL RESEARCH: TOOLS & STRATEGIES* 83–84, 99–104 (4th ed. 2009).

237. *Id.* at 84. Compare *Ionics, Inc. v. Elmwood Sensors, Inc.*, 110 F.3d 184 (1st Cir. 1997) (overruling a prior case by informal en banc review noted in the West editorial summary and headnotes), with *Mapp*, 170 F.3d 328 (2d Cir. 1999) (overruling a prior case by informal en banc footnote not noted in the West editorial summary or headnotes).

reading the footnotes carefully to see whether a substantive discussion in the text also happens to overrule one or more prior cases. Citators will, of course, indicate a later citation to a case even if that citation appears in a footnote.²³⁸ But citator treatment descriptions are incomplete; unless the informal en banc case specifically states that it is overruling a prior case, the citator treatment indicator may be ambiguous and fail to alert researchers to the true significance of the later informal en banc case.²³⁹ Further, not all informal en banc cases affect the validity of earlier precedent; sometimes they announce new rules of law or address questions of first impression. Nothing in a citator entry will alert a researcher to the use of informal en banc review in those circumstances.

3. Effect on Traditionally Marginalized Groups

Another concern that informal en banc procedures create is that their use will be concentrated among cases involving traditionally marginalized groups, whether for purposes of overruling prior precedent or other reasons. Again, the parallel to nonprecedential opinions arises. It has been documented that many cases involving traditionally marginalized groups, such as criminal defendants, prisoners, civil rights plaintiffs, and persons seeking public assistance, are resolved through nonprecedential opinions because these cases are not considered important enough to merit the effort that precedential opinions require.²⁴⁰ In the context of informal en banc procedures, the percentage of criminal cases raises red flags. From 2003 through 2007, criminal cases comprised anywhere from 29.69% to 38.02% of the federal appellate docket, for an average of approximately 33.93%.²⁴¹ Although the percentage of cases in each category justifying en banc review could not be expected to mirror the percentage they comprise of the docket precisely, these numbers do suggest that, over time, there would be

238. SLOAN, BASIC LEGAL RESEARCH, *supra* note 236, at 129.

239. See Sloan, *supra* note 164, at 925 n.203 (discussing ambiguities in citator treatment descriptions).

240. Pether, *supra* note 224, at 1438–39.

241. ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR, *supra* note 71, at 90 tbl.B-1A (showing 14,505 criminal cases out of 38,740 total, constituting about 37.44% of all cases); ADMIN. OFFICE OF THE U.S. COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 107 tbl.B-1A (2006), available at <http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf> (showing 14,589 criminal cases out of 38,366 total, constituting about 38.02% of all cases); ADMIN. OFFICE OF THE U.S. COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 106 tbl.B-1A (2005), available at <http://www.uscourts.gov/judbus2005/appendices/b1a.pdf> (showing 11,681 criminal cases out of 35,141 total, constituting about 33.24% of all cases); ADMIN. OFFICE OF THE U.S. COURTS, 2004 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 81 tbl.B-1A (2004), available at <http://www.uscourts.gov/judbus2004/appendices/b1a.pdf> (showing 10,217 criminal cases out of 32,655 total, constituting about 31.28% of all cases); ADMIN. OFFICE OF THE U.S. COURTS, 2003 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 75 tbl.B-1A (2003), available at <http://www.uscourts.gov/judbus2003/appendices/b1a.pdf> (showing 9925 criminal cases out of 33,419 constituting about 29.69% of all cases).

significantly more civil cases meriting informal en banc review than criminal cases simply by virtue of their predominance on the docket. Yet that is not the case with informal en banc review. This suggests that criminal defendants may not be getting the benefit of formal en banc review as frequently as civil litigants are.²⁴²

4. Negative Impact on Collegiality

Calls for formal en banc review can negatively affect the collegiality of the court.²⁴³ While informal en banc review can mitigate the tensions formal en banc review can create, it also has the potential to create tensions of its own. These tensions arise both because of the way en banc review operates and because of the lack of consensus regarding appropriate use of the procedure.

The way informal en banc review operates can negatively affect the collegiality of the court. This is because, in most circuits, only a majority of the court must approve action taken through informal en banc review; the procedure usually does not require unanimous action.²⁴⁴ What should happen (and what usually happens) when a majority of judges declines to undertake formal en banc review of a case is that the status quo is maintained. With informal en banc review, however, if judges who disagree with the proposed action cannot garner enough votes to force formal en banc review, the panel then becomes free to change the status quo by taking the proposed action.

For example, assume a judge calls for a vote on whether to undertake formal en banc review of a case that poses the issue of overruling Precedent X. If the vote is negative, Precedent X remains the law of the circuit. If the vote is positive, the case is heard by the full court, and Precedent X is either upheld or overruled. Now assume that a panel proposes overruling Precedent X and invokes informal en banc review. If a majority votes to hear the case en banc, Precedent X again is either upheld or overruled by the full court, which is the same as the formal en banc scenario. But if a majority does *not* vote to hear the case en banc, the panel will consider itself free to overrule Precedent X. The decision regarding whether to hear a case en banc is necessarily probabilistic and based on less complete information than would be available for formal en banc review on the merits.²⁴⁵ Thus, the minority of judges who oppose the panel's decision to

242. See Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991–2002*, 70 GEO. WASH. L. REV. 259, 261 tbl.1 (2002) (noting the infrequency with which the District of Columbia Circuit heard criminal cases en banc from 1981–2002).

243. Ginsburg & Falk, *supra* note 3, at 1013; see also *supra* notes 160–63 and accompanying text.

244. See *infra* notes 246–50 and accompanying text.

245. Ginsburg & Falk, *supra* note 3, at 1032–33. If the vote for en banc review were the equivalent of consideration on the merits, reargument and rebriefing would be unnecessary in formal en banc review because the panel's decision and proffered justification for overruling Precedent X would be sufficient to determine the merits. *Id.* at 1033.

overrule Precedent *X* will not have had the same opportunity to persuade colleagues to their point of view in the informal en banc vote that they would have had in the formal en banc review process. Judges who oppose a panel's proposed informal en banc action may feel marginalized or otherwise aggrieved by having the panel take that action without formal en banc consideration.

This situation can be avoided if informal en banc review is used only when the vote to forego formal en banc review and adopt the panel's position is unanimous. The District of Columbia Circuit's policy requires unanimous acquiescence.²⁴⁶ The Tenth Circuit policy appears to be the same, in that its informal en banc footnotes all indicate unanimity.²⁴⁷ But that is not the case in all circuits. The Seventh Circuit routinely overrules circuit precedent in panel opinions over the dissent of multiple judges.²⁴⁸ The First Circuit's footnotes often indicate whether the panel's action is approved unanimously or by a majority of the judges,²⁴⁹ but it is impossible to tell whether this is just a variation in terminology or a true expression of some disagreement on the court. The Second Circuit's cases typically indicate only that the opinion was circulated and do not indicate the degree of agreement or disagreement with the panel's disposition.²⁵⁰

Further, the indication that the panel's action is unanimously approved, or at least that no objection was interposed, can mask disagreement over the proper disposition of the case. The Tenth Circuit's opinion in *United States v. Atencio*²⁵¹ is a case in point. In that case, the court's informal en banc footnote indicates that the decision to overrule a prior case was unanimous.²⁵²

246. Policy Statement, *supra* note 58, at 2. Not only must the decision be unanimous among all voting judges, but the total affirmative votes, even including recusals, must constitute an absolute majority of the court's active members. *Id.*

247. *See, e.g.*, *United States v. Goode*, 483 F.3d 676, 681 n.1 (10th Cir. 2007) (indicating that all judges agreed with the panel's disposition); *United States v. Flowers*, 464 F.3d 1127, 1130 n.1 (10th Cir. 2006) (indicating that each member of the court concurred with the panel's holding); *Estate of True v. Comm'r*, 390 F.3d 1210, 1226 n.13 (10th Cir. 2004) (indicating that the members of the en banc court unanimously agreed with the panel's disposition).

248. *See supra* notes 122–23 (citing informal en banc cases from the Seventh Circuit without unanimous acquiescence).

249. *Compare* *Crowe v. Bolduc*, 365 F.3d 86, 89 n.1 (1st Cir. 2004) (indicating that no judge objected to the panel's disposition of the case), *with In re Grand Jury Subpoenas*, 123 F.3d 695, 697 n.2 (1st Cir. 1997) (indicating that a majority of the judges approved of the panel's disposition of the case).

250. *See, e.g.*, *United States v. Gonzalez*, 420 F.3d 111, 132 n.18 (2d Cir. 2005); *Schulz v. IRS*, 395 F.3d 463, 465 n.1 (2d Cir. 2005); *Adeleke v. United States*, 355 F.3d 144, 155 n.9 (2d Cir. 2004). Occasionally, the Second Circuit will indicate that no judge requested rehearing en banc, *see, e.g.*, *Zerilli-Edelglass v. N.Y. City Transit Auth.*, 333 F.3d 74, 81 n.7 (2d Cir. 2003), or that all judges agree with the disposition, *see, e.g.*, *New Pac. Overseas Group (U.S.A.) Inc., v. Excal Int'l Dev. Corp.*, 252 F.3d 667, 670 n.1 (2d Cir. 2001).

251. 476 F.3d 1099 (10th Cir. 2007).

252. *Id.* at 1105 n.6; *see also* *Calvert Fire Ins. Co. v. Will*, 560 F.2d 792, 796 n.5 (7th Cir. 1977) (noting that the vote to rehear the case en banc was evenly split), *rev'd*, 437 U.S. 655 (1978).

In fact, however, the *Atencio* decision was the subject of considerable disagreement on the court. Six of the twelve judges eligible to vote voted for en banc consideration of the case. The case was not heard en banc, therefore, because the court was evenly divided and the decision to undertake en banc review requires a majority vote.²⁵³ The opinion is accompanied by a dissent from denial of en banc review joined by three judges who criticize the panel's opinion.²⁵⁴ Even though the vote to overrule the earlier case was unanimous, the rule *Atencio* put in its place was not unanimously accepted. The same issue arose in *Deppe v. Tripp*,²⁵⁵ in which differences arose not over the result in the case, but over the use of informal en banc review. As the dissent from the denial of rehearing noted, informal en banc approval indicates to the public that the full court approves of both the holding and the rationale.²⁵⁶ In *Deppe*, the dissenting judge agreed with the result but felt that the issues addressed in the panel opinion needed further development and clarification, thus rendering informal en banc endorsement of the opinion inappropriate.²⁵⁷ These cases demonstrate that the apparent agreement underlying informal en banc cases may be overstated.²⁵⁸

In addition to disagreement over using informal en banc review in inappropriate circumstances, discord has also arisen over failure to invoke informal en banc review when others on the court thought it was required. The language in the concurrence in the District of Columbia Circuit's *In re Sealed Case*²⁵⁹ is especially sharp:

As the majority opinion notes, . . . the panel here explicitly acknowledged that its holding "contradicts our holding in [United States v. Ortez.] . . . that district courts lack authority to consider substantial assistance [to the government when sentencing a criminal defendant] absent a government motion [regarding the defendant's assistance] . . ." While it did discuss,

253. *Atencio*, 476 F.3d at 1100 (order denying initial en banc review).

254. *Id.* at 1108 (Murphy, J., joined by Kelly & Briscoe, JJ., dissenting).

255. 863 F.2d 1356 (7th Cir. 1988).

256. *Id.* at 1368 n.* (Ripple, J., dissenting from denial of rehearing en banc).

257. *Id.*

258. *Boston and Maine Corp. v. Chicago Pacific Corp.*, 785 F.2d 562 (7th Cir. 1986), is another example of the ways disagreement creeps into decisions characterized as unanimous. In that case, a footnote (n.*) accompanying the caption of the case states that no judge requested rehearing en banc regarding the overruling of a prior panel bankruptcy opinion in a case related to the case before the court. The majority panel opinion in fact mentions the prior bankruptcy opinion only in note* and in the explanation of the background of the case; it does not analyze or otherwise discuss the case. *Id.* at 563–64. In an opinion concurring in part and dissenting in part, however, Judge John Coffey states that the majority's holding effectively overrules the prior bankruptcy opinion. *Id.* at 567 (Coffey, J., concurring in part and dissenting in part). He then states that he agrees that the earlier opinion should be overruled, but that the court should do so overtly, rather than ignoring the prior bankruptcy opinion. *Id.* Further, although he agrees with one part of the majority's holding, he disagrees with another part of it. *Id.* The en banc footnote, therefore, does not seem to capture fully the differences of opinion regarding proper disposition of the case that existed even among the members of the three-judge panel.

259. 181 F.3d 128 (D.C. Cir. 1999).

and then reject, *Ortez*[,] concluding that “[A later Supreme Court case] effectively overrules that aspect of *Ortez*[.]” . . . it did so with no *Irons* footnote seeking *en banc* endorsement (based presumably on “an intervening Supreme Court decision” making *Ortez* “clearly an incorrect statement of current law”). Had the panel opinion been circulated to the full court with an *Irons* footnote, the opinion would not have been endorsed unanimously as required (as manifested by today’s lopsided vote to the contrary) and it could not have issued in the form it did. The fact that we are correcting our course now does not, and should not, obscure what necessitated the correction.²⁶⁰

Some degree of discord among judges is probably unavoidable, and almost any decisional process carries the potential to create disagreements. Informal *en banc* review is no different. For all the benefits to collegiality it can provide, it also has the potential to create rifts on the court, just as formal *en banc* review does.

5. Denying Parties an Opportunity To Participate

Judges with minority views are not the only ones deprived of meaningful opportunity to participate in the decisionmaking process when panels invoke informal *en banc* review. The parties to the case also lose their chance to influence the court because they are completely cut out of the process. Parties can ask for formal *en banc* review using the procedures outlined in FRAP 35. Indeed, the Supreme Court ruled in *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*²⁶¹ that fundamental fairness requires giving litigants an opportunity to participate in the process through the right to suggest rehearing *en banc*. Even if the judges vote *sua sponte* to rehear a case *en banc*, the parties ordinarily receive notice that the court is reconsidering its position and have an opportunity to persuade the court to adopt their position through additional briefing and oral argument.

Not so with informal *en banc* review. Parties cannot invoke the procedure and cannot predict when it might be used. Consequently, their litigation strategy may be compromised. Parties cannot be sure whether they should attempt to distinguish or limit contrary precedent or argue for informal *en banc* overruling. They also cannot be sure whether they can rely on established precedent. They may build a litigation strategy around circuit precedent only to have the panel unexpectedly overrule it. With

260. *Id.* at 146 (Henderson, J., concurring) (citations and footnotes omitted); *see also* *United States v. VanMeter*, 278 F.3d 1156, 1167 (10th Cir. 2002) (Lucero, J., concurring) (criticizing the majority for failing to seek *en banc* review before rejecting a prior panel opinion, citing *Romano v. Gibson*, 239 F.3d 1156 (10th Cir. 2001), which employed informal *en banc* review to overrule prior circuit precedent); *United States v. Castiglia*, 894 F.2d 533, 540 (2d Cir. 1990) (Winter, J., concurring in part and dissenting in part) (dissenting from the majority’s opinion on the ground that it effectively overrules a prior panel opinion without invoking either formal or informal *en banc* review), *reh’g denied, id.* (per curiam) (stating that prior to filing the opinion was circulated to all active judges).

261. 345 U.S. 247, 261 (1953); *see also* Part II.A (discussing the development of formal *en banc* review procedures).

informal en banc review, the parties lose their opportunity to participate in the process and may find themselves disadvantaged by an unanticipated change in the law. This runs contrary to the premises underlying the adversarial system and subjects litigants to unfair surprise.

6. Uncertain Precedential Status

The precedential force of informal en banc opinions is another question. En banc opinions have, practically if not jurisprudentially, greater precedential weight than panel opinions do. Under the law of the circuit rule, the court must convene en banc to overrule prior precedent,²⁶² regardless of whether the prior precedent was decided by a panel or the full court. In that sense, therefore, cases decided en banc have no greater precedential value than those decided by a panel. Nevertheless, formal en banc opinions are often presumed to carry greater precedential force than panel opinions.²⁶³ As the Supreme Court has explained, a circuit court convenes en banc “only when extraordinary circumstances exist that call for *authoritative consideration and decision* by those charged with the administration and development of the law of the circuit.”²⁶⁴ As a practical matter, it is hard to persuade a federal appellate court to undertake formal en banc review of a case.²⁶⁵ Having heard an issue en banc, therefore, the court will probably be even less inclined to take it up again, at least in the short run, thus conferring a greater practical weight on a formal en banc opinion.

It is unclear whether informal en banc opinions have the status of panel opinions, the status of formal en banc opinions, or some unique status. The federal appellate courts themselves are unclear on whether informal en banc

262. See *supra* notes 27–30 and accompanying text.

263. Bennett & Pembroke, *supra* note 3, at 536–37. Even the Seventh Circuit, which has a fairly liberal view of the law of the circuit rule, applies the rule strictly to formal en banc opinions:

[N]o matter how many other courts may have reached a conclusion contrary to our own, absent Supreme Court pronouncement to the contrary or legislative revision, a panel of this court is bound by a prior (and recent) decision of the court reached *en banc*. . . . *En banc* consideration is required to overrule such a decision. . . . Hence, for purposes of decision by this panel, [a prior formal en banc opinion] states the applicable law, and we must reject respondents’ argument that it should be overruled. Appropriate principles of *stare decisis* make it quite undesirable for us to reconsider here the legal propositions announced in [a prior formal en banc opinion].

Anthony v. Wilkinson, 637 F.2d 1130, 1136–37 (7th Cir. 1980) (footnotes and citations omitted), *vacated and remanded sub nom.*, *Hawaii v. Mederios*, 453 U.S. 902 (1981). On a similar note, denial of en banc review has been said to strengthen the authoritative value of a panel opinion. Wald, *supra* note 31, at 484.

264. *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960) (emphasis added).

265. Formal en banc review is not a frequent occurrence in most circuits. See Barrett, *supra* note 3, at 1046 (estimating that the federal appellate courts hear less than one percent of their cases en banc); *supra* p. 728, fig.1.

cases constitute true en banc cases.²⁶⁶ The boilerplate *Irons* footnote used in the District of Columbia Circuit emphasizes that the opinion has been “considered and approved by the full court, and thus constitutes the law of the circuit.”²⁶⁷ In the First Circuit, the court emphasizes that an informal en banc opinion is not an en banc opinion, stating that the informal en banc procedure, “needless to say, does not convert this opinion into an *en banc* decision nor preclude a suggestion of rehearing *en banc* on any issue in the case.”²⁶⁸

The Second Circuit implies that the circulated opinion constitutes en banc review in at least one opinion. The court states the requirement that it convene en banc to overrule circuit precedent and then explains that the opinion has been circulated to the full court, thereby suggesting that the action taken meets the requirements of the law of the circuit rule.²⁶⁹ Like the Second Circuit, the Fifth Circuit acknowledges the law of the circuit rule and then says that, because the other judges did not object to the panel’s taking action that requires en banc review, the panel deems itself authorized to so act.²⁷⁰ This language suggests, but does not clearly indicate, that the panel’s opinion is tantamount to a formal en banc opinion.

The Seventh Circuit’s local rule establishing procedures for informal en banc review says nothing about the weight or status of an opinion invoking the procedure.²⁷¹ One of the Eighth Circuit’s few informal en banc opinions implies that the opinion is, in fact, a formal en banc opinion: “As a matter of court procedure, a panel cannot overrule a prior panel opinion of

266. Procedural irregularities can also render the status of cases subject to informal en banc procedures uncertain. For example, in one case, a divided panel circulated its opinion to the full court seeking approval to overrule two prior panel opinions. *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364, 1365 n.** (7th Cir. 1976). The full court voted with the panel dissenter not to overrule the cases. *Id.* The opinion, therefore, which is denominated a per curiam opinion, is written by the original panel’s dissenter and is said to represent the views of that judge and the majority of the full court. The two other judges on the panel filed a dissenting opinion. *Id.* at 1369 (Swygert & Bauer, JJ., dissenting). It is unclear how a panel opinion with two dissenting judges should be treated; presumably, the per curiam “majority” opinion has some force as the opinion of all but two members of the court, especially because it declines to overrule the earlier cases, but this is not clear.

267. *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981); *accord* *Chung v. U.S. Dep’t of Justice*, 333 F.3d 273, 278 n.* (D.C. Cir. 2003); *United States v. Rostenkowski*, 59 F.3d 1291, 1299 n.* (D.C. Cir. 1995).

268. *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 9 n.5 (1st Cir. 1992). This notation, that the court is not ruling en banc and does not preclude a suggestion for en banc review, first appears in *Trailer Marine Transportation Corp. v. Rivera Vazquez* and then in footnotes in later cases. *See, e.g.*, *Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 67 n.2 (1st Cir. 2004); *Crowe v. Bolduc*, 365 F.3d 86, 89 n.1 (1st Cir. 2004); *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 138 n.1 (1st Cir. 2000).

269. *United States v. Brutus*, 505 F.3d 80, 87 n.5 (2d Cir. 2007).

270. *Dornbusch v. Comm’r*, 860 F.2d 611, 612 n.1 (5th Cir. 1988); *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 706 n.8 (5th Cir. 1986).

271. 7TH CIR. R. 40(e).

this court. For that reason, this opinion has been circulated to the court *en banc*, and the court *en banc* has approved it.”²⁷²

The Tenth Circuit has modified the wording of its informal *en banc* footnote over time. When the procedure was first used and for several years thereafter, the footnote provided as follows: “Because this panel opinion overrules Tenth Circuit precedent, it has been circulated among all the judges of this court in regular active service. All judges have expressed agreement with the conclusions expressed herein” with respect to the proposed action.²⁷³ More recently, a different turn of phrase has started to appear saying that the opinion “[has] been circulated to the *en banc* court,” which unanimously agrees to the proposed action.²⁷⁴ In a 2007 case, the court’s panel opinion used the following language: “For these reasons, the *en banc* court now overrules” a prior circuit precedent,²⁷⁵ although the underlying disagreement about that case may have prompted the stronger language in the informal *en banc* footnote.²⁷⁶ Each iteration of the footnote language suggests in stronger terms that the panel’s action is tantamount to formal *en banc* review.

These variations in language create questions about the weight of the opinions and the very nature of the courts’ actions. While the First Circuit goes to pains to emphasize that the opinion is only a panel opinion, other circuits imply or even expressly state the opposite. The First Circuit’s disclaimer is especially curious in its statement that the opinion does not preclude a party’s request to rehear the case *en banc*. When a panel invokes informal *en banc* review, that generally means that a majority of judges did not vote for formal *en banc* review of the case. Thus, the utility of a party’s request for *en banc* review is questionable, unless the court is admitting that the other judges did not engage meaningfully with the case²⁷⁷ and might reconsider the *en banc* vote upon briefing by the parties.

The District of Columbia Circuit’s language is confusing in saying that the opinion is the law of the circuit because all panel opinions (at least all published or precedential ones)²⁷⁸ are the law of the circuit.²⁷⁹ The court

272. *Three Buoys Houseboat Vacations U.S.A. Ltd. v. Morts*, 921 F.2d 775, 779 n.5 (8th Cir. 1990).

273. *See, e.g., United States v. Allen*, 895 F.2d 1577, 1580 n.1 (10th Cir. 1990); *accord* *Reppy v. U.S. Dep’t of Interior*, 874 F.2d 728, 730 n.5 (10th Cir. 1989); *EEOC v. Gaddis*, 733 F.2d 1373, 1377 n.3 (10th Cir. 1984).

274. *Estate of True v. Comm’r*, 390 F.3d 1210, 1226 n.13 (10th Cir. 2004); *see also United States v. Flowers*, 464 F.3d 1127, 1130 n.1 (10th Cir. 2006); *United States v. Goff*, 314 F.3d 1248, 1250 n.1 (10th Cir. 2003); *United States v. Pena-Sarabia*, 297 F.3d 983, 989 n.2 (10th Cir. 2002).

275. *United States v. Atencio*, 476 F.3d 1099, 1105 n.6 (10th Cir. 2007).

276. *See supra* notes 251–54 and accompanying text.

277. *See supra* Part III.B.7 (discussing the problem of potentially inadequate consideration of informal *en banc* cases).

278. *See Sloan, supra* note 164, at 921–22 (discussing the uncertain status of nonprecedential opinions in the District of Columbia Circuit).

279. *See, e.g., Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 198 (D.C. Cir. 2001).

could be trying to convey that an *Irons* footnote case has some stronger precedential weight than a panel opinion (equivalent to that of an en banc opinion) because it was approved by the full court. The statement could also mean that the case cannot be disregarded later on the ground that one panel cannot overrule an earlier panel. The court's intent is unclear, and its policy statement governing informal en banc review sheds no light on the matter.

If informal en banc opinions are treated simply as panel opinions, can a later panel (using the informal en banc procedure) overrule the prior informal en banc cases, or do these cases have enough precedential force that the court would have to invoke formal en banc review to undo them?²⁸⁰ Can a panel use informal en banc review to overrule a prior formal en banc opinion? If informal en banc review is equivalent to formal en banc review, there is no reason why this could not happen.²⁸¹ Although it is possible to speculate about how informal en banc opinions fit within the hierarchy of precedent, at bottom, these questions do not have answers. The courts have not addressed, either by rule or in their opinions, the status of informal en banc opinions.

280. I have not found cases in which an opinion that uses informal en banc review to overrule a prior panel opinion is itself overruled by a later informal en banc opinion. In *Granberry v. Thieret*, 823 F.2d 1212, 1214–15 (7th Cir. 1987), the panel declined to overrule a prior panel opinion that had employed informal en banc review to overrule yet another panel opinion. The Seventh Circuit has, however, used multiple informal en banc cases to develop rules of law. For example, *United States v. Stillwell*, 900 F.2d 1104, 1104 n.* (7th Cir. 1990), used informal en banc review to decide, as a question of first impression in the circuit, that a federal arson statute applied to a private residence whose only connection to interstate commerce was the natural gas hook up. This opinion was later modified by an informal en banc footnote in *United States v. Martin*, 147 F.3d 529, 529 n.1 (7th Cir. 1998), which said that the question of connection to interstate commerce was properly raised for the first time on appeal as plain error. *Id.* at 532. *Stillwell* was later abrogated on the substantive issue in *Jones v. United States*, 529 U.S. 848, 852 n.2 (2000). In another instance, the court used an informal en banc footnote to decide a question of first impression in *United States v. West*, 670 F.2d 675, 675 n.* & 686 (7th Cir. 1982). *West* was later overruled by informal en banc footnote in *United States v. Green*, 258 F.3d 683, 692 n.4 (7th Cir. 2001). *United States v. Anton*, 683 F.2d 1011 (7th Cir. 1982), provides a third example. In that case, the court used informal en banc review to create an intercircuit conflict with the Ninth Circuit regarding the intent requirement in a federal criminal statute. *Id.* at 1011 n.*. *Anton* was later overruled by informal en banc review in *United States v. Carlos-Colmenares*, 253 F.3d 276, 277 (7th Cir. 2001).

281. Although it is unusual for a court to use informal en banc review to overrule a prior en banc opinion, this has occurred from time to time. See, e.g., *United States v. Marble*, 940 F.2d 1543, 1547 & n.* (D.C. Cir. 1991) (overruling *United States v. Wright*, 627 F.2d 1300 (D.C. Cir. 1980)), *United States v. Robertson*, 507 F.2d 1148 (D.C. Cir. 1974), and *Whalem v. United States*, 346 F.2d 812 (D.C. Cir. 1965) (en banc), in light of later statutory and Supreme Court authority); *Feit v. Ward*, 886 F.2d 848, 849 n.* (7th Cir. 1989) (overruling *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983) (en banc), in light of a later Supreme Court opinion, *Schweiker v. Chilicky*, 487 U.S. 412 (1988)). Because the earlier cases had been undermined by intervening superior authority, however, the panels could have overruled them by invoking an exception to the law of the circuit rule without seeking informal en banc approval. See *supra* note 34 and accompanying text. Accordingly, although a panel's use of informal en banc review to overrule an earlier en banc case could be questioned, doing so in these cases was not clearly in violation of the law of the circuit rule.

7. Quality of Engagement

Informal en banc review necessarily involves less rigorous review than formal en banc review does. Parties do not rebrief or reargue the case; the decision is based on the panel's proposed opinion and whatever justification the panel provides.²⁸² Indeed, the entire purpose of informal en banc review is to allow for full court review without the effort formal en banc review requires. If the informal process were not less work, the courts would not use it. This diminished degree of review, however, presents problems, especially in circuits that allow informal en banc endorsement of an opinion based on lack of objection from other members of the bench, rather than affirmative acquiescence.

In the Fifth²⁸³ and Seventh Circuits,²⁸⁴ lack of objection from colleagues empowers a panel to take the proposed action and indicate informal en banc approval. In the District of Columbia²⁸⁵ and Tenth²⁸⁶ Circuits, affirmative agreement is required. In the First and Second Circuits, the standard is unclear; some informal en banc cases indicate only lack of objection,²⁸⁷ whereas others indicate active consensus or acquiescence among the members of the court.²⁸⁸ Indeed, some Second Circuit cases state only that the opinion was circulated, with no indication of the reaction of the rest of the court to the panel's opinion.²⁸⁹

There is a significant difference between failure to object and affirmative agreement. The first option permits, in essence, an answer of silence. Nothing in the process indicates that all, or even any, of the judges have truly considered the question. The second option allows the jurisprudential

282. See, e.g., Policy Statement, *supra* note 58, at 2 (requiring a "substantive memorandum" from the panel explaining why informal en banc review is appropriate for the case).

283. *Dornbusch v. Comm'r*, 860 F.2d 611, 612 n.1 (5th Cir. 1988) (indicating that none of the judges objected or called for the case to be heard en banc); *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 706 n.8 (5th Cir. 1986) (same).

284. The Seventh Circuit's rule provides that the panel can act so long as a majority of the court's judges "do not vote to rehear en banc the issue of whether the position should be adopted." 7TH CIR. R. 40(e). This is a bit different from the Fifth Circuit's approach because it appears to invite a formal en banc vote. But it is still a "no objection" approach as opposed to an affirmative agreement approach. Ginsburg & Falk, *supra* note 3, at 1016.

285. Policy Statement, *supra* note 58, at 2.

286. See cases cited *supra* note 247 (indicating agreement or concurrence with the panel's disposition, not mere lack of objection thereto).

287. See, e.g., *Zerilli-Edelglass v. N.Y. City Transit Auth.*, 333 F.3d 74, 81 n.7 (2d Cir. 2003) (indicating that no active judge sought formal en banc review); *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 138 n.1 (1st Cir. 2000) (noting that the opinion was circulated and no active judge objected to the proposed action).

288. See, e.g., *New Pac. Overseas Group (U.S.A.) Inc. v. Excal Int'l Dev. Corp.*, 252 F.3d 667, 670 n.1 (2d Cir. 2001) (indicating that the opinion was circulated and all active judges on the court expressed agreement with the panel's disposition of the case); *In re Grand Jury Subpoenas*, 123 F.3d 695, 697 n.2 (1st Cir. 1997) (noting that the majority of active judges approved the panel's action).

289. See, e.g., *United States v. Brutus*, 505 F.3d 80, 87 n.5 (2d Cir. 2007); *Adeleke v. United States*, 355 F.3d 144, 155 n.9 (2d Cir. 2004).

equivalent of what could be called an “okay, fine” answer, one that calls for minimal engagement, although at least it calls for an affirmative response. When a panel circulates an opinion indicating the action it proposes and asking for approval, judges can agree without fully considering the matter. Judges are likely to defer to their colleagues on the panel who have been considering the matter more seriously. Further, the decision is necessarily based on incomplete information. It is roughly equivalent to the amount of information available on a call for an en banc vote, which is also inherently tentative because of incomplete information.²⁹⁰ But instead of being a vote to consider the case more fully, the informal en banc vote is one affirmatively to adopt the panel’s position.

This observation is not intended to impugn the judiciary or suggest that judges are failing to consider the cases before them. There are a number of informal en banc cases in which one or more judges voted to hear the case en banc and even dissented from denial of rehearing en banc.²⁹¹ This suggests meaningful engagement with the case. And the fact that a decision is unanimous does not, by itself, indicate lack of serious consideration. The point is simply that most people, when faced with a question for which failure to object constitutes agreement or which can be answered with abbreviated review, are not going to give the matter the degree of attention that they would give a question requiring a substantive response, especially when the answer is based on limited information. The risk that the degree of engagement with overruling prior precedent will fall below acceptable standards is real.²⁹² This risk has to be balanced against the benefits informal en banc review provides. At least in the context of overruling circuit precedent, it does not justify the risk.²⁹³

III. FORMALIZING STANDARDS AND PROCESSES FOR LEGITIMATE USE OF INFORMAL EN BANC REVIEW

Given both the advantages and disadvantages of informal en banc review, what should the federal appellate courts do? The real solution is a complete reevaluation of the hierarchy of circuit precedent. William Richman has noted that panel precedent has acquired a “hyperprecedential” status.²⁹⁴

290. See Ginsburg & Falk, *supra* note 3, at 1032–34 (describing the inherent uncertainty about the merits of a case in a vote on formal en banc review and the comparatively greater expertise panel judges have with respect to the case).

291. See *supra* cases cited notes 253–57.

292. This again is a concern that arises in the context of nonprecedential opinions: that judges do not give the same degree of attention to opinions that will not be binding on future tribunals and delegate decision making to clerks and staff attorneys. See generally Pether, *supra* note 2.

293. Cf. *Deppe v. Tripp*, 863 F.2d 1356, 1368 n.* (7th Cir. 1988) (Ripple, J., dissenting from denial of rehearing en banc) (arguing that the panel’s informal en banc opinion on questions of first impression requires further thought and development and therefore should be considered through formal en banc review).

294. William M. Richman, *Much Ado About the Tip of an Iceberg*, 62 WASH. & LEE L. REV. 1723, 1726 (2005).

Amy Coney Barrett has argued that strict application of the law of the circuit rule violates due process because of its preclusive effect; it prevents parties from arguing that an opinion in an earlier case to which they were not parties should be overruled.²⁹⁵ To the extent these statements are accurate, they apply only to “published” circuit precedent. But the majority of federal circuit court opinions are “unpublished,” or nonprecedential.²⁹⁶ The prevalence of nonprecedential opinions has already largely undermined the law of the circuit rule.²⁹⁷ As I have argued elsewhere, it would be better for the courts to acknowledge and clearly define the status of these opinions in the system of precedent. I have proposed redefining nonprecedential opinions as “overrutable” opinions and “published” opinions as fully precedential opinions.²⁹⁸

Under this proposal, overrutable opinions would be subject to overruling by a later three-judge panel in a fully precedential opinion, and then fully precedential opinions would be subject to the law of the circuit rule and overrutable only by the court sitting en banc.²⁹⁹ By eliminating a category of precedent that can be fully ignored (and until recently, not even cited in some circuits),³⁰⁰ a panel would not have to choose between issuing all-or-nothing precedents. Most opinions would probably be issued as overrutable, but they would be binding, legitimate circuit precedents, subject to overruling by a process considerably less onerous than formal en banc review. The law of the circuit rule could then be relatively strictly applied to fully precedential opinions. I say relatively because there is no reason to jettison the present exceptions for panel overrulings of opinions that have been directly undermined by intervening superior authority. Giving all federal circuit opinions precedential value, albeit most weak and only a few strong, would obviate the need for informal en banc review.

This type of fundamental reevaluation of the hierarchy of circuit precedent is not likely to occur.³⁰¹ Operating in the existing environment, the easiest approaches to informal en banc review offer two absolutes: eliminate informal en banc review altogether or allow courts to continue to use it without any formal limitations, as they do now. Neither absolute is satisfying. Denying circuit courts reasonably efficient ways of dealing with matters that do not clearly call for formal en banc review is neither practical nor advisable. But allowing unbounded use of informal en banc review results in the proliferation of the problems the process creates. Accordingly, until the federal circuit courts are willing to reassess the

295. Barrett, *supra* note 3.

296. ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR, *supra* note 71, at 48 tbl.S-3.

297. See *supra* note 224 and accompanying text (discussing the impact of nonprecedential opinions on principles of stare decisis).

298. Sloan, *supra* note 164, at 929–31; see also DuVivier, *supra* note 225, at 418 (arguing in favor of retaining nonprecedential opinions as a less binding form of precedent).

299. Sloan, *supra* note 164, at 929–31.

300. *Id.*

301. *Id.* at 951.

categories of precedent, informal en banc procedures should be allowed in certain limited situations, but both the standards governing use of the informal en banc review and the process to be followed when the procedure is invoked must be clearly articulated and consistent across circuits. The authorization of informal review requires the federal appellate courts to act in their judicial capacity, but the procedural requirements for such review could be set out in local court rules or internal operating procedures.

A. *Clarifying the Standards Governing Informal En Banc Review*

The circuits that use informal en banc review need to clarify the standards governing use of the procedure. Presently, only the District of Columbia Circuit has articulated in any meaningful way the appropriate use of informal en banc review.³⁰² The other circuits should do the same. These standards should expressly define when informal en banc review is not appropriate, as well as when it is.

Specifically, the federal appellate courts should reaffirm their commitment to the law of the circuit rule by stating that informal en banc review is not appropriately used when a panel seeks to overrule earlier panel precedent that is in force in the circuit and has not been invalidated by intervening superior authority.³⁰³ This limitation should apply even when the panel believes that overruling an earlier case would be more consistent with precedent from the Supreme Court or other circuits. The prerogative of overruling prior circuit precedent should remain with the court sitting in its formal en banc capacity except when that precedent has been directly undermined by intervening superior authority, such as a circuit formal en banc opinion, a Supreme Court opinion, a federal statute or regulation, or state law (in cases involving interpretation of state law).

The federal appellate courts should then expressly limit the use of informal en banc review to cases in which formal en banc review is not clearly required. This would include cases in which a panel opinion creates or continues a circuit split, formally overrules precedent that has been directly undermined by intervening superior authority, clarifies an apparent inconsistency in circuit precedent, modifies an existing rule without overruling prior precedent, addresses a question of first impression or announces a rule or policy where none existed before, or resolves a case with unusual procedural history or some other unique aspect that does not involve overruling circuit precedent.

Why do these limits make sense? In all of the situations in which informal en banc review can legitimately be used, the panel at least arguably could act without en banc acquiescence. All circuits say that a panel's authority to overrule a prior panel decision rendered invalid by later superior authority is an exception to the law of the circuit rule.³⁰⁴ In other

302. Policy Statement, *supra* note 58.

303. *See supra* note 28 (collecting cases stating the law of the circuit rule).

304. *See supra* note 34 (collecting cases).

cases, even if the panel could act on its own, it may be advantageous to obtain the acquiescence of the full court.

When it comes to overruling cases that have not been undermined by superior authority, however, the courts should not use informal en banc review. The courts should make the law of the circuit rule a strong rule in this circumstance to maintain public confidence in the courts. Because the courts make and enforce rules of precedent, strict adherence to those rules is necessary for judicial legitimacy.³⁰⁵ It would be virtually impossible to obtain Supreme Court review of the law of the circuit rule itself or a circuit's adherence to it even assuming that the Supreme Court's supervisory power gives it the authority to review the rule.³⁰⁶ If one panel failed to follow the decision of an earlier circuit panel and the Supreme Court granted certiorari in the case, it is unlikely in the extreme that the Supreme Court would address the law of the circuit rule. Instead, the Court would address the substantive merits of the case.³⁰⁷ In effect, therefore, the circuit courts are solely responsible for both articulating and enforcing the rule of horizontal stare decisis. Individual judges occasionally take their colleagues to task for perceived failures to follow the law of the circuit rule,³⁰⁸ but those cases are not the norm. Even if a judge thinks her colleagues are not following the rule as they should, she will not often address the issue publicly out of concern for the collegiality of the court.³⁰⁹ Further, an individual judge cannot change the outcome if the majority of the panel declines to follow the law of the circuit rule.³¹⁰

Given that context, it becomes clear that faithful adherence to the law of the circuit rule is necessary to avoid both the actuality and appearance of arbitrary decision making. The legitimacy of the courts depends on the appearance of fairness they bring to the adjudicatory process.³¹¹ Litigants must feel that they are fairly treated. When a panel in one case says it must follow circuit precedent even if it disagrees with it³¹² and in another takes it

305. See Shannon, *supra* note 220, at 690–91.

306. See Sloan, *supra* note 15, at 737 n.125 (explaining supervisory power).

307. See, e.g., *Fed. Sav. & Loan Ins. Corp. v. Ticktin*, 490 U.S. 82, 83 n.1 (1989) (noting the panel's overruling of a prior case, but not commenting on the informal en banc procedure), *rev'g* 832 F.2d 1438 (7th Cir. 1987).

308. See, e.g., *Watts v. Burkhart*, No. 89-6160, 1991 WL 261224, at *10–11 (6th Cir. Dec. 13, 1991) (Contie, J., dissenting), *vacated*, 978 F.2d 269 (6th Cir. 1992) (en banc) (overruling *Manion v. Michigan Board of Medicine*, 765 F.2d 590 (6th Cir. 1985)).

309. See *supra* notes 160–63 (discussing the importance of collegiality on the court).

310. Ginsburg & Falk, *supra* note 3, at 1017 (noting that an individual circuit judge has little authority because substantive decisions require at least two judges to agree).

311. See CAPPALLI, *supra* note 16, §§ 7.03–.06, at 80–83.

312. See, e.g., *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 432 (5th Cir. 2008) (acknowledging the state's arguments regarding waiver but deeming itself bound by prior panel precedent, whether right or wrong); *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004) (stating that if the panel were the first to address the issue presented in the case, it might have reached a different conclusion, but deeming itself bound by prior panel opinions pending overruling by the court en banc or the Supreme Court).

upon itself to overrule prior precedent,³¹³ the courts ultimately shortchange their legitimacy in the name of expediency.

One criticism of this approach is that it is too strict. Disallowing informal en banc procedures to overrule outlier or clearly wrong precedent will encourage panels to go to extraordinary lengths to distinguish cases or avoid language in prior opinions as dicta. There is a difference between overruling a single case that is contrary to the weight of circuit precedent and resolving a conflict between two competing lines of authority. Perhaps the federal appellate courts should not use informal en banc procedures in the latter of these situations, but why not allow it in the former? And adherence to precedent that is substantively wrong can hardly be said to advance legitimacy or fairness. Obviously, there are judgment calls involved in these determinations, but a judge's job is to make discernments among cases, and the judgment about whether a case requires en banc review is just another of those situations. Also, if all of the judges agree with the outcome, what difference does it make whether the result is reached through formal or informal en banc review?

These are all good points, but on balance, the better course of action is for the courts to resist using informal en banc review to overrule cases unless those cases have been directly invalidated by intervening superior authority. Most importantly, the legitimacy concerns articulated above trump the efficiency advantages of informal en banc review in this context.

Additionally, for outlier cases or clearly wrong precedent, the effort involved in formal en banc review should not be significantly greater than that of informal en banc review.³¹⁴ This is especially true if all of the judges agree with the result. The agreement of all judges on the court does not render formal en banc review superfluous. The fact that all members of a panel agree does not mean that a single judge can decide the case alone. Just because the justices of the Supreme Court may be unanimous in a decision does not mean a case does not merit certiorari review. By the same token, even if all judges on the court would agree with the result of an en banc determination, that does not mean that formal en banc review itself is unnecessary.³¹⁵

Moreover, the number of cases at issue is still relatively small enough at this point that the additional effort of formal en banc review should not be excessively burdensome.³¹⁶ For those circuits (most notably the Seventh) in which informal en banc review is used so frequently for overruling panel

313. See, e.g., *Russ v. Watts*, 414 F.3d 783, 784 n.1 (7th Cir. 2005); see also cases cited *supra* Part III.B.1.

314. Statistics from the Administrative Office of the U.S. Courts indicate that the federal appellate courts decide a small number of formal en banc cases without additional briefing or argument. See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR, *supra* note 71, at 46 tbl.S-1.

315. Ginsburg & Falk, *supra* note 3, at 1034 (noting that formal en banc opinions that affirm the panel operate to increase the confidence of both the parties and the public in the result).

316. See *supra* p. 738, fig.2.

precedent that it would be unworkable to employ formal en banc review instead, the answer may be to reduce the number of judges who must participate in formal en banc review. The largest federal circuits are already empowered to adopt rules authorizing formal en banc review with fewer than all of the judges on the circuit,³¹⁷ although only the Ninth Circuit has adopted the “limited” en banc option so far.³¹⁸ This procedure is not perfect,³¹⁹ but no procedure is. To avoid the problems that using informal en banc review to overrule prior panel precedent creates, the relative merits of using fewer judges for formal en banc review must be considered.

The courts would be well advised to learn the lesson that nonprecedential opinions provide. Short-term expediencies in a small number of cases have the potential to turn into a morass of problems.³²⁰ If informal en banc review were to overtake formal en banc review, as has already happened in two circuits,³²¹ the courts could very well face the same legitimacy problems in this context that they do with nonprecedential opinions now. Rather than follow that road, they should limit the use of informal en banc review now.

B. *Establishing Procedures Governing Informal En Banc Review*

Once the federal appellate courts limit the cases eligible for informal en banc review, they must clarify the procedures for utilizing the procedure, including the number of judges who must concur in the action, the required manifestation of that concurrence, and the method of indicating such concurrence in the panel opinion.

Informal en banc review should not be used unless the full court unanimously agrees with the proposed disposition. Because informal en banc review involves changing the status quo,³²² panels should not be able to go forward with a proposed disposition without full agreement on the court. The agreement should extend not only to the specific action for which informal en banc review is sought, but also with the ultimate result and reasoning of the case. As the dissent from denial of rehearing en banc in a Seventh Circuit case noted, informal en banc approval indicates to the public that the full court approves of both the holding and the rationale.³²³ The type of disagreement apparent in the Tenth Circuit’s *Atencio* decision,

317. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (providing that “[a]ny court of appeals having more than 15 active judges . . . may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals”).

318. 9TH CIR. R. 35-3. *See generally* Rymer, *supra* note 72.

319. For a critique of the Ninth Circuit’s practice, *see generally* Rymer, *supra* note 72.

320. *See generally* Sloan, *supra* note 15; Sloan, *supra* note 164.

321. *See supra* p. 738–39, fig.2 (Second Circuit table and Seventh Circuit table).

322. *See supra* notes 244–45 and accompanying text (discussing how informal en banc review changes the status quo in ways that votes on formal en banc review do not).

323. *Deppe v. Tripp*, 863 F.2d 1356, 1368 n.* (7th Cir. 1988) (Ripple, J., dissenting from denial of rehearing en banc).

in which all judges agreed that an earlier case was wrong but were split on what the new rule should be, should disqualify an opinion from informal en banc review.³²⁴ Further, informal en banc review should require affirmative acquiescence of all judges on the court. Failure to object should not be sufficient.

Finally, the indication of informal en banc approval should not be in a footnote. There is simply no reason for the courts to treat informal en banc review as a subsidiary matter or to hide the fact of such review in a footnote. Informal en banc action should be prominently noted in the opinion, both to facilitate accurate research and to make the court's action as transparent as formal en banc review. The text of the opinion should state the reason for seeking informal en banc review and the affirmative approval of the full court. If the informal en banc action affects the precedential value of prior precedent, the case or cases should be identified by name and citation to the extent possible.³²⁵

C. Implementing Procedures for Informal En Banc Review

All circuits that have an informal en banc procedure should authorize it by en banc judicial opinion with meaningful discussion of the basis for the rule, not unsupported statements of their authority to change the law³²⁶ or cryptic, unexplained citations to prior cases.³²⁷ Courts have the authority to alter or amend rules of precedent acting in their judicial capacity.³²⁸ If they are going to use informal en banc review, they should exercise their judicial power to authorize the procedure and identify its legitimate uses.³²⁹ Once a circuit articulates the basis for—and limits on—its informal en banc procedure, it would not have to do so again in every subsequent opinion; later opinions could then simply cite the opinion that originally articulates the procedure.

324. See *supra* notes 251–54 and accompanying text (discussing the intense disagreement among the judges over proper disposition of the case).

325. Obviously, a panel may not be aware of every previously decided case in the circuit and therefore may not be able to list each affected case in the informal en banc opinion. Nevertheless, every effort in that regard should be made. Of course, adopting this requirement is not the same as following it. The Seventh Circuit presently requires such disclosure in its Local Rule 40(e), but not all Seventh Circuit informal en banc cases contain the required information.

326. See, e.g., *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

327. See *supra* Part II.B.2 (discussing the development of informal en banc review in individual circuits).

328. See Sloan, *supra* note 15, at 712–13 (noting that courts traditionally established rules of precedent using adjudicatory, rather than rulemaking, power); see also *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (creating an exception to the law of the circuit rule).

329. For an example of use of adjudicatory power to make rules of precedent, see *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), in which the U.S. Court of Appeals for the Eleventh Circuit, which had recently been formed from the Fifth Circuit's rib, adopted Fifth Circuit precedent as binding in the new circuit and indicated that adjudication, not rulemaking, was the appropriate mechanism for making that type of jurisprudential decision. *Id.* at 1207.

Courts should not rely on local rules to authorize the procedure, in effect, using local rules to alter the rules of precedent the way they have with nonprecedential opinions.³³⁰ On the surface, this might seem appealing because a procedural rule is a good way to spell out detailed review procedures and to state a prospective rule of general applicability. But approaching informal en banc review this way is inconsistent with the purpose of local rules. Further, from the judiciary's perspective, it is a dangerous way to implement informal en banc review. Because rules are promulgated with delegated legislative authority, using them to make rules of precedent leaves the courts open to further regulation on the matter by Congress.³³¹ The courts have already opened themselves up to this possibility by purporting to define the value of nonprecedential opinions by local rule.³³² If they do not want to further risk ceding judicial power to the legislative branch, they should not authorize informal en banc review procedures in their local rules.

Once informal en banc review is authorized by en banc opinion, however, the use of local rules or internal operating procedures would be appropriate, although not absolutely necessary, to implement the ministerial aspects of the process (including, but not limited to, the manner in which a panel initiates informal en banc review, the materials to be provided to the off-panel judges, and the amount of time permitted for review). The administrative aspects of the process could also be established through the en banc opinion authorizing informal en banc review. The Federal Rules of Appellate Procedure would not be an appropriate vehicle for implementing the process because informal en banc review is not presently used in all circuits. If all circuits were to adopt informal en banc review, however, having uniform standards in the Federal Rules of Appellate Procedure might be desirable.³³³

Regardless of the method of implementing informal en banc review, it is important that the federal appellate courts conceptualize the procedure as unusual and extraordinary, not as a routine occurrence. In this regard, if putting the implementing procedures in local rules makes it seem routine, the rules should not be used in this way. On the other hand, both FRAP 35 and local rules state that en banc review is an extraordinary step, and the courts seem to have little difficulty avoiding routine use of en banc review. Therefore, it would seem that the same would be true of informal en banc review; once the policy of sparing use is articulated, the courts should be able to apply the policy.

330. Shannon, *supra* note 220, at 649; Sloan, *supra* note 164, at 934.

331. Sloan, *supra* note 15, at 733–46.

332. Sloan, *supra* note 164, at 937–40.

333. *Cf. id.* at 927–29 (arguing that development of consistent standards for issuance of nonprecedential opinions through FRAP would be desirable).

CONCLUSION

The use of informal en banc procedures is legitimate and even salutary in certain circumstances, but the lack of standards for use of informal en banc review and the inconsistencies in procedures across circuits are problematic. The federal appellate courts have already learned in the context of nonprecedential opinions that developing exceptions to established rules of precedent in a piecemeal way is a recipe for disaster. What starts off as an unusual circumstance that develops idiosyncratically in each circuit can become the proverbial elephant in the living room. The federal appellate courts should not allow the development of informal en banc procedures to take this route. Ultimately, they would do well to reevaluate the hierarchy of precedent as it presently exists to obviate the need for informal en banc review. Barring that unlikely occurrence, they should acknowledge the existence, develop consistent standards for employing, and exercise restraint in using informal en banc review before the exception gradually swallows the rule.

APPENDIX A: INFORMAL EN BANC CASES BY CIRCUIT

This appendix lists informal en banc cases by circuit in descending order from latest to earliest. Pinpoint citations refer to the page and, as appropriate, footnote indicating that the panel used informal en banc review. Criminal cases are indicated with an asterisk (*). The nature of the action taken in the case is indicated by the following letter codes:

I = Creating or continuing intercircuit conflict

Q = Resolving a question of first impression or stating a rule or policy where none existed before

C = Resolving intracircuit conflict or ambiguity or modifying a rule without overruling prior cases (including rejecting prior panel precedent without overruling it)

U = Overruling precedent undermined by intervening superior authority

O = Overruling panel precedent presently in force

M = Miscellaneous

See Section II.B.1, *supra*, for more discussion of these categories and the methodology used to compile and categorize cases.

First Circuit

United States v. Heldeman, 402 F.3d 220, 224 (1st Cir. 2005).	Q	*
Educadores Puertorriqueños en Acción v. Hernández, 367 F.3d 61, 67 n.2 (1st Cir. 2004).	U	
Crowe v. Bolduc, 365 F.3d 86, 89 n.1 (1st Cir. 2004).	U	
Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co., 215 F.3d 136, 138 n.1 (1st Cir. 2000).	U	
Hollingsworth & Vose Co. v. A-P-A Transp. Corp. 158 F.3d 617, 620 n.5 (1st Cir. 1998).	O	
Grant-Chase v. Comm'r, N.H. Dep't of Corr., 145 F.3d 431, 435 n.3 (1st Cir. 1998).	Q	*
Kelley v. Airborne Freight Corp., 140 F.3d 335, 357 n.15 (1st Cir. 1998).	M	
<i>In re</i> Grand Jury Subpoenas, 123 F.3d 695, 697 n.2 (1st Cir. 1997).	O	*
Ionics, Inc. v. Elmwood Sensors, Inc., 110 F.3d 184, 187 n.3 (1st Cir. 1997).	O	
United States v. Indelicato, 97 F.3d 627, 629 n.2 (1st Cir. 1996).	O	*
Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 711 n.1 (1st Cir. 1996).	O	
NLRB v. Hosp. San Rafael, Inc., 42 F.3d 45, 51 n.1 (1st Cir. 1994).	C	
Wright v. Park, 5 F.3d 586, 591 n.7 (1st Cir. 1993).	C	
United States v. Rivera, 994 F.2d 942, 950–51 (1st Cir. 1993).	C	*
Trailer Marine Transp. Corp. v. Rivera Vazquez, 977 F.2d 1, 9 n.5 (1st Cir. 1992).	O	
Gallagher v. Wilton Enters., Inc., 962 F.2d 120, 124 n.4 (1st Cir. 1992).	O	
Bonneau v. United States, 961 F.2d 17, 22 n.3 (1st Cir. 1992).	U	*
United States v. Bucuvalas, 909 F.2d 593, 598 n.9 (1st Cir. 1990).	U	*

Second Circuit

United States v. Brutus, 505 F.3d 80, 87 n.5 (2d Cir. 2007).	O	*
United States v. Parkes, 497 F.3d 220, 230 n.7 (2d Cir. 2007).	O	*
Burda Media, Inc. v. Viertel, 417 F.3d 292, 298 n.5 (2d Cir. 2005).	C	

United States v. Garcia, 413 F.3d 201, 205 n.2 (2d Cir. 2005).	Q	*
United States v. Gonzalez, 420 F.3d 111, 132 n.18 (2d Cir. 2005).	C	*
United States v. Crosby, 397 F.3d 103, 105 n.1 (2d Cir. 2005).	Q	*
Schulz v. IRS, 395 F.3d 463, 465 n.1 (2d Cir. 2005).	U	
United States v. Mincey, 380 F.3d 102, 103 n.1 (2d Cir. 2004).	Q	*
Tesser v. Bd. of Educ., 370 F.3d 314, 320 n.3 (2d Cir. 2004).	C	
Adeleke v. United States, 355 F.3d 144, 155 n.9 (2d Cir. 2004).	U	*
United States v. Walker, 353 F.3d 130, 134 n.2 (2d Cir. 2003).	U	*
Zerilli-Edelglass v. N.Y. City Transit Auth., 333 F.3d 74, 81 n.7 (2d Cir. 2003).	C	
Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.13 (2d Cir. 2002).	U	
New Pac. Overseas Group (U.S.A.) Inc. v. Excal Int'l Dev. Corp., 252 F.3d 667, 670 n.1 (2d Cir. 2001).	U	
Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812, 242 F.3d 52, 55 (2d Cir. 2001).	U	
<i>In re</i> FCC, 208 F.3d 137, 140 (2d Cir. 2000).	Q	
Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 355 n.13 (2d Cir. 2000).	C	
Hernandez v. Conriv Realty Assocs., 182 F.3d 121, 122 n.1 (2d Cir. 1999).	M	
<i>In re</i> Flannery, 186 F.3d 143, 149 (2d Cir. 1999).	Q	
United States v. Mapp, 170 F.3d 328, 338 n.15 (2d Cir. 1999).	O	*
Farrell Lines, Inc. v. Ceres Terminals, Inc., 161 F.3d 115, 117 n.1 (2d Cir. 1998).	O	
United States v. Hargrett, 156 F.3d 447, 451 (2d Cir. 1998).	C	*
United States v. Cruz, 156 F.3d 366, 372 n.6 (2d Cir. 1998).	Q	*
United States v. Ortiz, 143 F.3d 728, 729 n.1 (2d Cir. 1998).	O	*
Galtieri v. United States, 128 F.3d 33, 37 n.4 (2d Cir. 1997).	Q	*
Jacobson v. Fireman's Fund Ins. Co., 111 F.3d 261, 268 n.9 (2d Cir. 1997).	U	
Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 5 n.3 (2d Cir. 1996).	U	
Danneskjold v. Hausrath, 82 F.3d 37, 39 n.1 (2d Cir. 1996).	C	*
Aguirre v. INS, 79 F.3d 315, 318 n.2 (2d Cir. 1996).	O	

Pa. Dep't of Env'tl. Res. v. FDIC, 78 F.3d 97, 100 n.1 (2d Cir. 1996).	O	
Valley Disposal, Inc. v. Cent. Vt. Solid Waste Mgmt. Dist., 71 F.3d 1053, 1056 n.3 (2d Cir. 1995).	U	
Binder v. Long Island Lighting Co., 57 F.3d 193, 202 n.4 (2d Cir. 1995).	O	
United States v. Grant, 52 F.3d 448, 451 n.4 (2d Cir. 1995).	Q	*
Pillay v. INS, 45 F.3d 14, 17 n.2 (2d Cir. 1995).	Q	
United States v. Macchia, 41 F.3d 35, 39 n.1 (2d Cir. 1994).	U	*
Pagnucco v. Pan Am. World Airways, Inc. (<i>In re Air Disaster at Lockerbie Scot. on Dec. 21, 1988</i>), 37 F.3d 804, 810 n.1 (2d Cir. 1994).	M	
Murray v. Nat'l Broad. Co., 35 F.3d 45, 48 n.1 (2d Cir. 1994).	Q	
United States v. Batista, 22 F.3d 492, 493 (2d Cir. 1994).	Q	*
HBE Leasing Corp. v. Frank, 22 F.3d 41, 45 (2d Cir. 1994).	C	
United States v. Jacobson, 15 F.3d 19, 22 (2d Cir. 1994).	Q	*
United States v. Cutler, 6 F.3d 67, 73 n.5 (2d Cir. 1993).	C	*
United States v. Burnett, 989 F.2d 100, 102 n.1 (2d Cir. 1993).	Q	*
Dir., Office of Worker's Comp. Programs, U.S. Dep't of Labor v. Gen. Dynamics Corp., 982 F.2d 790, 795 n.3 (2d Cir. 1992).	U	
Campino v. United States, 968 F.2d 187, 189 n.1 (2d Cir. 1992).	Q	*
Wilder v. Bernstein, 965 F.2d 1196, 1199 (2d Cir. 1992).	M	
Finkel v. Stratton Corp., 962 F.2d 169, 175 n.1 (2d Cir. 1992).	Q	
United States v. Pujana-Mena, 949 F.2d 24, 31 n.4 (2d Cir. 1991).	C	*
Kramer v. Time Warner, Inc., 937 F.2d 767, 774 (2d Cir. 1991).	C	
Germain v. Conn. Nat'l Bank, 926 F.2d 191, 194 (2d Cir. 1991).	C	
United States v. Schwartz, 924 F.2d 410, 414 n.1 (2d Cir. 1991).	Q	*
Ceres Partners v. GEL Assocs., 918 F.2d 349, 364 (2d Cir. 1990).	Q	
United States v. Castiglia, 894 F.2d 533, 540 (2d Cir. 1990) (Winter, J., concurring in part and dissenting in part).	U	*
Fleck v. E.F. Hutton Group, Inc., 891 F.2d 1047, 1048 (2d Cir. 1989).	C	
United States v. Rivera, 844 F.2d 916, 926 (2d Cir. 1988).	Q	*

Campos v. LeFevre, 825 F.2d 671, 676 n.1 (2d Cir. 1987).	O	*
United States v. Khan, 821 F.2d 90, 93 n.1 (2d Cir. 1987).	C	*
United States v. Gantzer, 810 F.2d 349, 353 n.1 (2d Cir. 1987).	U	*
Prudential Lines, Inc. v. McAllister Bros., Inc., 801 F.2d 616, 621 n.1 (2d Cir. 1986).	U	
United States v. Reed, 773 F.2d 477, 478 n.1 (2d Cir. 1985).	O	*
Trapnell v. United States, 725 F.2d 149, 155 (2d Cir. 1983).	O	*
B.K. Instrument, Inc. v. United States, 715 F.2d 713, 717 n.2 (2d Cir. 1983).	U	
United States v. Roglieri, 700 F.2d 883, 887 (2d Cir. 1983).	C	*
United States v. Ingredient Tech. Corp., 698 F.2d 88, 99 (2d Cir. 1983).	C	*
Maiorino v. Bradford Savs. Bank, 691 F.2d 89, 94 n.* (2d Cir. 1982).	C	
Mitsui & Co. v. Am. Exp. Lines, Inc., 636 F.2d 807, 821 n.* (2d Cir. 1981).	C	
Boothe v. Hammock, 605 F.2d 661, 665 n.5 (2d Cir. 1979).	U	
Grimes v. United States, 607 F.2d 6, 17 n.10 (2d Cir. 1979).	Q	*
Lee v. Joseph E. Seagram & Sons, Inc., 592 F.2d 39, 44 (2d Cir. 1979).	O	
<i>In re Phillips</i> , 510 F.2d 126, 127 (2d Cir. 1975).	M	
United States v. Taylor, 464 F.2d 240, 244 (2d Cir. 1972).	O	*
United States v. Freeman, 357 F.2d 606, 607 n.* (2d Cir. 1966).	C	*

Fourth Circuit

Bell v. United States, 521 F.2d 713, 715 n.3 (4th Cir. 1975).	C	*
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Fifth Circuit

Milofsky v. Am. Airlines, Inc., 404 F.3d 338, 346 n.19 (5th Cir. 2005).	I	
United States v. Vasquez-Olvera, 999 F.2d 943, 943 n.* (5th Cir. 1993).	I	*
Estate of Farrar v. Cain, 941 F.2d 1311, 1316 n.22 (5th Cir. 1991).	I	
United States v. Edelman, 873 F.2d 791, 795 n.1 (5th Cir. 1989).	C	*
Dornbusch v. Comm'r, 860 F.2d 611, 612 n.1 (5th Cir. 1988).	O	
Koonce v. Quaker Safety Prods. & Mfg. Co., 798 F.2d 700, 706 n.8 (5th Cir. 1986).	O	
Affholder, Inc. v. S. Rock, Inc., 746 F.2d 305, 311 (5th Cir. 1984).	O	

Sixth Circuit

Watts v. Burkhart, No. 89-6160, 1991 WL 261224, at *10 (6th Cir. Dec. 13, 1991).	O	
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Seventh Circuit

Saban v. U.S. Dep't of Labor, 509 F.3d 376, 379 (7th Cir. 2007).	O	
United States v. Parker, 508 F.3d 434, 436 n.1 (7th Cir. 2007).	O	*
Bolante v. Keisler, 506 F.3d 618, 621 (7th Cir. 2007).	I	
Iqbal Ali v. Gonzales, 502 F.3d 659, 661 n.1 (7th Cir. 2007).	I	
United States v. Hamilton, 499 F.3d 734, 737 (7th Cir. 2007).	O	*
Corral v. United States, 498 F.3d 470, 475 (7th Cir. 2007).	Q	*
Fairley v. Fermaint, 482 F.3d 897, 901 n.* (7th Cir. 2007).	O	
United States v. Tejeda, 476 F.3d 471, 476 (7th Cir. 2007).	Q	*
Humphries v. CBOCS W., Inc., 474 F.3d 387, 403 n.12 (7th Cir. 2007).	O	
Doe v. Smith, 470 F.3d 331, 346 n.24 (7th Cir. 2006).	Q	
Forrester v. Rauland-Borg Corp., 453 F.3d 416, 417 (7th Cir. 2006).	C	
Meridian Sec. Ins. Co. v. Sadowski, 441 F.3d 536, 540 n.† (7th Cir. 2006).	C	
United States v. Bonner, 440 F.3d 414, 414 n.1 (7th Cir. 2006).	Q	*
Diaz v. Prudential Ins. Co. of Am., 424 F.3d 635, 640 (7th Cir. 2005).	O	

Cent. States, Se. & Sw. Areas Pension Fund v. Schilli Corp., 420 F.3d 663, 663 n.1 (7th Cir. 2005).	C	
Russ v. Watts, 414 F.3d 783, 784 n.1 (7th Cir. 2005).	O	
Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 410 F.3d 964, 978 n.13 (7th Cir. 2005).	I	
Toney v. L'Oreal USA, Inc., 406 F.3d 905, 911 n.4 (7th Cir. 2005).	C	
United States v. Castillo, 406 F.3d 806, 822 n.7 (7th Cir. 2005).	Q	*
United States v. White, 406 F.3d 827, 837 (7th Cir. 2005).	Q	*
United States v. Schlifer, 403 F.3d 849, 855 (7th Cir. 2005).	Q	*
United States v. Lee, 399 F.3d 864, 867 n.† (7th Cir. 2005).	Q	*
United States v. Paladino, 401 F.3d 471, 485 (7th Cir. 2005).	Q	*
McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005).	Q	*
Owens v. United States, 387 F.3d 607, 611 (7th Cir. 2004).	O	*
Frederiksen v. City of Lockport, 384 F.3d 437, 439 (7th Cir. 2004).	C	
United States v. Johnson, 380 F.3d 1013, 1018 (7th Cir. 2004).	I	*
Kircher v. Putnam Funds Trust, 373 F.3d 847, 851 (7th Cir. 2004).	I	
Spiegla v. Hull, 371 F.3d 928, 942 n.7 (7th Cir. 2004).	O	
United States v. Mitrione, 357 F.3d 712, 718 n.2 (7th Cir. 2004).	O	*
Int'l Fin. Servs. Corp. v. Chromas Techs. Can., Inc., 356 F.3d 731, 739 n.4 (7th Cir. 2004).	I	
Bethea v. Robert J. Adams & Assocs., 352 F.3d 1125, 1129 (7th Cir. 2003).	I	
United States v. Mitchell, 353 F.3d 552, 561 n.9 (7th Cir. 2003).	I	*
United States v. Howze, 343 F.3d 919, 924 (7th Cir. 2003).	O	*
United States v. Russell, 340 F.3d 450, 457 n.3 (7th Cir. 2003).	I	*
Gill v. Ashcroft, 335 F.3d 574, 579 (7th Cir. 2003).	I	
Samirah v. O'Connell, 335 F.3d 545, 550 n.6 (7th Cir. 2003).	I	
Lewis v. Peterson, 329 F.3d 934, 937 (7th Cir. 2003).	I	
Thomas v. United States, 328 F.3d 305, 309 (7th Cir. 2003).	Q	*
United States v. Lange, 312 F.3d 263, 269 n.† (7th Cir. 2002).	Q	*
Heinz v. Cent. Laborers' Pension Fund, 303 F.3d 802, 803 n.1 (7th Cir. 2002).	I	

United States v. Ceballos, 302 F.3d 679, 692 n.4 (7th Cir. 2002).	O	*
Stone v. City of Indianapolis Pub. Util. Div., 281 F.3d 640, 644 (7th Cir. 2002).	Q	
Herrnreiter v. Chi. Hous. Auth., 281 F.3d 634, 638 (7th Cir. 2002).	Q	
Goetzke v. Ferro Corp., 280 F.3d 766, 774 n.5 (7th Cir. 2002).	U	
United States <i>ex rel.</i> Chandler v. Cook County, Ill., 277 F.3d 969, 980 n.10 (7th Cir. 2002).	I	
Shropshear v. Corp. Counsel of Chi., 275 F.3d 593, 597 (7th Cir. 2001).	C	
United States v. Trotter, 270 F.3d 1150, 1156 n.† (7th Cir. 2001).	O	*
Richman v. Sheahan, 270 F.3d 430, 439 n.5 (7th Cir. 2001).	Q	
United States v. Sherman, 268 F.3d 539, 548 (7th Cir. 2001).	M	*
Malachinski v. Comm'r, 268 F.3d 497, 508 n.5 (7th Cir. 2001).	O	
Ashley v. United States, 266 F.3d 671, 675 n.* (7th Cir. 2001).	O	*
United States v. Green, 258 F.3d 683, 692 n.4 (7th Cir. 2001).	O	*
United States v. Carlos-Colmenares, 253 F.3d 276, 277 (7th Cir. 2001).	O	*
Whetsel v. Network Prop. Servs., LLC, 246 F.3d 897, 904 n.3 (7th Cir. 2001).	O	
United States v. Richardson, 238 F.3d 837, 841 (7th Cir. 2001).	I	*
United States v. Nance, 236 F.3d 820, 822 n.1 (7th Cir. 2000).	U	*
Moran v. Rush Prudential HMO, Inc., 230 F.3d 959, 972 n.7 (7th Cir. 2000).	I	
Gen. Serv. Employees Union, Local No. 73 v. NLRB, 230 F.3d 909, 916 n.1 (7th Cir. 2000).	I	
Fernandez v. Sternes, 227 F.3d 977, 981 (7th Cir. 2000).	I	
DeWalt v. Carter, 224 F.3d 607, 618 n.6 (7th Cir. 2000).	U	
Walker v. O'Brien, 216 F.3d 626, 629 (7th Cir. 2000).	O	*
Lee v. Clinton, 209 F.3d 1025, 1027 (7th Cir. 2000).	O	
Herzberger v. Standard Ins. Co., 205 F.3d 327, 330 (7th Cir. 2000).	C	
Gibson v. West, 201 F.3d 990, 994 n.3 (7th Cir. 2000).	O	
United States v. McMutuary, 217 F.3d 477, 477 n.** (7th Cir. 2000).	C	*

Brouwer v. Raffensberger, Hughes & Co., 199 F.3d 961, 967 n.4 (7th Cir. 2000).	Q	
United States v. Buford, 201 F.3d 937, 942 (7th Cir. 2000).	C	*
Walker v. Nat'l Recovery Inc., 200 F.3d 500, 504 (7th Cir. 1999).	C	
Johnson v. Apfel, 189 F.3d 561, 563 (7th Cir. 1999).	O	
United States v. Garecht, 183 F.3d 671, 676 n.5 (7th Cir. 1999).	U	*
Harris Trust & Sav. Bank v. Salomon Bros. Inc., 184 F.3d 646, 653 n.1 (7th Cir. 1999).	I	
French v. Duckworth, 178 F.3d 437, 447 n.3 (7th Cir. 1999).	I	*
United States v. Szabo, 176 F.3d 930, 930 n.2 (7th Cir. 1999).	Q	*
Generac Corp. v. Caterpillar, Inc., 172 F.3d 971, 975 n.1 (7th Cir. 1999).	O	
Walthal v. Rusk, 172 F.3d 481, 483 n.2 (7th Cir. 1999).	I	
United States v. Wilson, 169 F.3d 418, 427 n.9 (7th Cir. 1999).	O	*
Heidelberg v. Ill. Prisoner Review Bd., 163 F.3d 1025, 1025 n.* (7th Cir. 1998).	U	*
United States v. Martin, 147 F.3d 529, 529 n.1 (7th Cir. 1998).	C	*
United States v. Newman, 144 F.3d 531, 533 n.* (7th Cir. 1998).	I	*
Autry v. Nw. Premium Servs., Inc., 144 F.3d 1037, 1037 n.* (7th Cir. 1998).	U	
Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan, 144 F.3d 1014, 1014 n.* (7th Cir. 1998).	O	
Ind. Gas Co. v. Home Ins. Co., 141 F.3d 314, 319 n.* (7th Cir. 1998).	I	
Doe v. Univ. of Ill., 138 F.3d 653, 655 n.* (7th Cir. 1998).	I	
Gibson v. Brown, 137 F.3d 992, 998 n.4 (7th Cir. 1998).	I	
Felzen v. Andreas, 134 F.3d 873, 878 (7th Cir. 1998).	O	
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